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SUMMARY

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 4

FEDERAL TRADE COMMISSION ET AL., APPELLANTS

v.

CLAIRE FURNACE COMPANY ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLANTS ON REARGUMENT

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of the District of Columbia in this case, filed April 19, 1920, was not officially reported. It will be found in the record. (R. 100.)

The opinion of the Court of Appeals of the District of Columbia is reported in 285 Fed. 936 and 52 App. D. C. 202. (See R. 115.)

GROUNDS OF JURISDICTION

The action was brought to restrain the Federal Trade Commission from taking steps to compel the complainant corporations to file monthly reports of their business. (R. 2-11.)

The Commission interposed an amended answer (R. 77–89), and the complainants joined in a motion to strike it out on the ground that it did not state a defense (R. 94), which motion was granted, and thereupon final decree was entered March 10, 1922, against the defendants (R. 97), from which appeal was taken to the Court of Appeals of the District of Columbia (R. 100), which affirmed the decree on January 2, 1923 (R. 126).

An appeal to this Court was allowed March 17, 1923 (R. 128) under Section 250 of the Judicial Code. The courts below held that the Commission had no power to require the information it demanded.

STATEMENT

This case presents the question whether the Federal Trade Commission has power to require certain corporations engaged in interstate commerce to file with the Commission periodical statements of their financial operations and reports of their business.

The case was argued in December, 1923, and a reargument ordered by the Court. The brief for the United States used on the original argument covers the field, and no attempt will be made in this brief to restate the entire case or do more than emphasize some points and rearrange some of the material.

It is proposed (1) to make clear just what information the Commission has asked for, (2) to consider if Congress has power to require the information to be furnished, and (3) to ascertain whether Congress has authorized the Commission to demand the information.

Complainants joined in a motion to strike out the answer of the Commission on the ground that it did not state a defense. (R. 89–95.) The motion was granted and final decree thereupon entered for the complainants. (R. 97.) As separate motions to strike out the answer were not made by the several complainants, the action of the court in striking out the answer can not be sustained unless *all* of the complainants are in a situation entitling them to relief, and the power of the Commission to require the information must be tested by reference to the situation of that complainant which has least ground for resistance to the Commission's demand.

THE NATURE OF THE INFORMATION DEMANDED BY THE COMMISSION

The corporations from which information was asked are all engaged in selling iron, steel products, or coke in interstate commerce. They also make sales of such merchandise in intrastate commerce, and they are also engaged in lines of business which are not commerce, in that they manufacture or produce the merchandise which they sell in interstate and intrastate commerce,

instead of purchasing such merchandise from other manufacturers or producers. It is admitted in the complaint that some corporations sell as much as seventy-five to eighty per cent of their products in interstate commerce. (R. 6, 7.) The answer alleged that all but three of them sold sixty-five per cent or more of their products in interstate commerce. (R. 79.) Some of them, such as the Bethlehem Steel Company and the Inland Steel Company, may sell more than eighty per cent of their output in interstate commerce, as the complaint goes no further than to allege that they sell a "portion" of their products in the States where they produce or manufacture them. (R. 7.)

Enough is said of their operations in the pleadings to indicate that these corporations are engaged in basic industries of the utmost importance in the industrial life of the Nation; that they do business on a very large scale; represent very large aggregations of capital, and it is fair to infer that the veil of privacy has already been lifted from their affairs to the extent usual in modern times for corporations of that class.

It was alleged in the answer that much of the information called for by the Commission is regularly disseminated through their trade publications and trade associations. (R. 81.) It was also alleged that the intrastate activities of the complainants are so interwoven with their interstate

business that it is impossible to separate them, and that even if they could be separated such separation would render the results inaccurate and of little value in enabling the Commission to perform its duties. (R. 86.) It is a fair inference that the accounts reflecting the operations of each of these companies in interstate and intrastate commerce, and in business which is not commerce at all, are more or less commingled, and that various expenses require allocation or apportionment between operations which are interstate and those which are not.

The Commission asked for monthly reports to be filled out by the corporations on forms furnished by the Commission. These forms called for balance sheets giving a complete statement of assets and liabilities (R. 32, 33), monthly income statements (R. 29–31) showing profits and such details as depreciation, general administrative expenses, and selling expenses (R. 28), a statement of orders booked during the month and unfilled at the end of the month (R. 27), statement of plant capacity (R. 26) and quantity produced (R. 15, 16), sales prices (R. 20–22), both domestic and export, and monthly statements of cost of production (R. 18, 19). The forms did not limit the requirements of the Commission to the interstate-commerce business of the complainants, and no segregation was asked for. The information called for relates to merchandise sold in interstate and in-

trastate commerce and the cost of manufacture or production. Much of the information relates to financial operations usually reflected in books of account, but part of it—such as plant capacity—is not information ordinarily the subject of accounting entries.

It was stipulated (R. 97) that the making of these reports involved no unreasonable outlay or expense to the corporations.

The forms were for general use, and it is not to be supposed that each of the complainants deals in all of the articles mentioned in the reports. *The information asked for is information which any well organized corporation with a modern system of accounting should be able to furnish on a moment's notice from accounts and records regularly kept for its own use.*

The inquiry by the Commission originated from the fact that the attention of Congress was directed to high prices prevailing for certain basic commodities, such as foodstuffs, fuel, textiles, leather, and steel and iron, and the House of Representatives, seeking the cause, called before one of its committees members of the Federal Trade Commission, who recommended inquiry into the conditions affecting costs and prices of these commodities, and Congress appropriated money for that purpose, with the idea that the information obtained might disclose influences affecting interstate commerce and form the basis for additional

legislation, or enable the Commission to take some action, or relieve the situation through publicity.

SPECIFICATION OF ERRORS TO BE URGED

The assigned errors to be urged are that the court below erred—

1. In holding that the amended answer did not state a defense.

2. In holding that Congress had no power to require these corporations to file the reports demanded by the Commission.

3. In holding that the Act of September 26, 1914, Chapter 311, 38 Stat. p. 717, known as the Federal Trade Commission Act, did not authorize the Commission to require the filing of the reports.

4. In affirming the judgment permanently enjoining the Commission from enforcing the demand for the reports.

ARGUMENT

Summary

I. Obtaining information about their interstate business from corporations engaged in interstate commerce is an appropriate means of enabling Congress to regulate interstate commerce.

II. The power to require such corporations to furnish information concerning their affairs can not be denied unless there be some specific provision of the Constitution restraining its exercise.

III. The ultimate question in this case is whether the power is restrained by the Fourth Amendment, prohibiting unreasonable searches and seizures.

IV. It is not an unreasonable invasion of privacy to require from these corporations reports of their interstate business, although the information is not for use

in any pending proceeding or in connection with pending legislation.

V. Having power to require information respecting their interstate commerce business, Congress has power to require information respecting the business of these corporations not interstate commerce, where (1) the accounts are commingled or (2) their other operations have a direct bearing on their activities in interstate commerce.

VI. The Commission is given power by the terms of the Federal Trade Commission Act to require reports in the form demanded.

The main questions are, first, whether Congress has power to require this information to be furnished, and, second, whether the Federal Trade Commission has been authorized to call for it. We contend:

First, that Congress has power to require corporations of the kind here involved, engaged in interstate commerce, to furnish periodical reports giving complete information with respect to their operations in interstate commerce, where, as in this case, the information is reasonable in extent and the furnishing of it involves no unreasonable expense or interference with business, and the information so obtained may form the basis for legislation, or for recommendations by the Commission to Congress for legislation, regulating interstate commerce, or may enable the Commission to determine whether practices exist which it is given power to deal with, and that the power of Congress to require corporations engaged in interstate commerce to furnish information re-

specting their affairs is not limited to situations where a pending complaint of misconduct or breach of law is being investigated, or where particular legislation is imminent and Congress has its attention focused in a concrete way upon the subject.

Second, if Congress has power to require from corporations engaged in interstate commerce reasonably complete information respecting their interstate business in the form of periodical reports, it has power to require similar information with respect to their activities other than those in interstate commerce where (1) the ccounts of their different operations are commingled or (2) such other operations have a direct bearing upon their activities in interstate commerce.

I

The power to require information respecting interstate commerce

The power of Congress to regulate commerce "acknowledges no limitations other than prescribed by the Constitution." Congress has power to make all laws which may be necessary and proper in carrying into execution its power to regulate commerce. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Obtaining, at first hand, from corporations engaged in interstate commerce information respecting their affairs and the manner in which that commerce is conducted is plainly an appropriate means of enabling Congress to properly exercise its power to regulate interstate commerce, and such a power can not be denied unless there is some specific provision of the Constitution restraining its exercise. To provide by law for the organization of commissions such as the Federal Trade Commission, to obtain information of this kind, analyze it, and submit recommendations to Congress with respect to legislation, or use the information to enable the Commission to discharge other duties imposed by law, is an appropriate means of exercising the power to regulate interstate commerce.

> All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules. [*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 474.]

The best way of obtaining accurate information about a business is to obtain it at first hand from those engaged in it.

Where, then, is the specific constitutional provision restraining the exercise of this power?

The provisions of the Fifth Amendment preventing extraction of incriminating evidence have no application here because corporations are not within its protection.

The provisions of the Fifth Amendment relating to taking property without due process of law are not violated in a case such as the present, where there is no undue expense imposed and no trade secrets are being taken or exposed.

The only constitutional provision bearing on the case, and the one which is chiefly relied on by the appellees, is the Fourth Amendment, providing that—

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *.

The so-called right of privacy—that is, the right to hold private books of account and documents free from the scrutiny of strangers—depends for its protection on the above provision in the Fourth Amendment. Not all searches and seizures are forbidden by it, but only those that are unreasonable.

The ultimate question in this case, therefore, is whether there is an *unreasonable* invasion of pri-

vacy in asking corporations of the kind here involved, engaged in the business of the character they are engaged in, to make periodical reports giving reasonably complete information respecting their operations.

The right of privacy is not an absolute one, and must give way wherever the public interest reasonably requires it. The question of reasonableness may depend on the manner in which the information is obtained, or on the nature of the information sought, or the purpose to which it is to be applied.

The constitutional provision against unreasonable searches and seizures may be violated by obtaining information in a secret or intrusive manner accompanied by force.

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385.
Gouled v. *United States,* 255 U. S. 298.
Amos v. *United States,* 255 U. S. 313.

The provision may also be violated where the demand for information is beyond reasonable limits in the extent to which it pries into a person's affairs. Such is a case where all books, papers, confidential correspondence, and documents belonging to a corporation are demanded without regard to their materiality or with the result of unduly hampering the business of the person from whom the information is demanded or imposing upon him unreasonable expense. *Hale* v. *Henkel,*

201 U. S. 43. There may also arise the question whether the nature of the information is such as to make it reasonably required in the public interest. Such was the *Kilbourn* case, 103 U. S. 168, where a committee of the House of Representatives demanded information and evidence with respect to a matter on which Congress had no power to legislate, and where the investigation "could result in no valid legislation," and where it was only a fruitless and intrusive investigation into private affairs.

In the present case the main contention advanced by the appellees is that Congress has not the power to require corporations engaged in interstate commerce to file periodical reports of their interstate business, because the information is not for use in any pending legal proceeding involving a specific charge of violation of law, nor for immediate use in connection with some concrete proposal for legislation pending in Congress.

It seems to be settled that Congress has power to require from a corporation information respecting its affairs where a specific charge or complaint is made of violation of law which is the subject of a pending investigation. It also seems to be settled that Congress or either House may, through committees, make investigation and require information as an aid in considering specific legislation on which Congress has focused its attention, where the matter is one which Congress has power to deal with. The contention of the

appellees is that it amounts to an unreasonable search and an unreasonable invasion of privacy for Congress, through a commission, to require the filing of periodical reports of corporations engaged in interstate commerce, the information so obtained to be used as a basis for recommendations to Congress for additional legislation or for enabling the commission to determine whether there are conditions existing which require more specific investigation. That the demand for these reports does not involve unreasonable search is shown by the following considerations:

1. While corporations are under the protection of the Fourth Amendment, the test of reasonableness may not be the same as in the case of individuals. Under modern conditions the veil of secrecy has already been largely lifted from the affairs of corporations, especially of the type here involved. Corporations are subject to complete visitorial powers of the States which charter them, and are generally required by the laws of such States to file periodical reports for public inspection. Corporations having vast capital and engaged in large enterprises usually have large numbers of stockholders entitled to periodical reports on the business, and the making of such reports to the stockholders broadcasts information respecting their affairs. Corporations having their stocks listed on stock exchanges for the information of investors file and publish very com-

plete information respecting their affairs. The old idea of secrecy among competitors has disappeared, and the modern idea is to exchange information; and the information called for here is largely of the statistical type which modern trade associations exchange among their members and claim the right to exchange, contending that such exchange is in the mutual interest of those engaged in the industry. A considerable part of the information called for in these reports could be obtained, if Congress authorized it, from reports filed with the Commissioner of Internal Revenue. All these considerations tend to show that the reports here demanded in this case involve a very slight invasion of privacy.

2. There is no inquisitive prying into the affairs of the corporations, no demand for unlimited examination of their private papers, and no "fishing expedition," but a specific statement of what is required.

3. There is no hampering of business, no substantial expense, and the information called for is that which any corporation with a modern system of accounting should be able to furnish readily from existing records.

4. The manner of requiring the information is reasonable and does not involve force, or stealth, or physical seizures.

5. The nature of the business of these corporations is a factor in the case. They are engaged in

basic industries. It is not contended that their business is of such a nature as to make those engaged in it subject to regulation under the principles announced in *Munn* v. *Illinois* (94 U. S. 113) and later cases. It is believed, however, that the nature of the business and the intense effect the manner of its conduct has upon the commercial life of the Nation is a factor bearing on the question whether the inquiry involves an "unreasonable" search, and which justifies a greater inqusitiveness than might be allowed as to businesses having a less direct bearing on the general welfare.

6. While in the end the question of reasonableness under the Fourth Amendment is a judicial one, some latitude must be allowed to Congress to determine how far it is necessary to invade privacy.

7. Finally, there is presented here the question whether Congress is to be limited to obtaining information through committees or commissions specially appointed from time to time to obtain information for use in pending matters, or whether it may adopt the modern and more scientific method of creating permanent commissions with authority to require periodical reports from corporations engaged in a business subject to congressional regulation, such information to be obtained by experts who are more likely to ask for necessary and useful information without partisan spirit and are less likely to bring out matters

which ought to be kept private than a temporary committee attempting the same work.

If Congress has power to require corporations engaged in interstate commerce to furnish complete information respecting their interstate business when the information is called for by a congressional committee for aid in considering some form of concrete legislation under immediate consideration, it is difficult to see why the power does not extend to obtaining that information through a permanent commission where there may not be a concrete measure pending in Congress and the information is sought for to point out the necessity for legislation or the necessity for refraining from it. To make the test of the existence of the power, or the want of it, the extent to which the attention of Congress may be directed upon specific proposed legislation involves principles too vague to establish a dividing line.

II

The power to require information respecting business not interstate

If it be determined that Congress has power to require reports from corporations engaged in interstate commerce, giving complete information with respect to their transactions in interstate commerce, it follows, as an incident to such power, that information may be required *from the same corporations* with respect to intrastate commerce or transactions not commerce at all, where (1) the

accounts of the two classes of business are commingled, or (2) the information has a direct bearing on the interstate commerce. The *Goodrich Transit Company* case (224 U. S. 194) may not be decisive in this case of the power to require periodical reports from corporations engaged in interstate commerce, because it dealt with the case of a public-service corporation, and to that extent presented a factor which does not exist in the present case, but it does plainly settle the proposition that if reports may be required as to interstate business they may cover intrastate business done by the same corporation. It was pointed out that accounts kept by a corporation doing both interstate and intrastate business could not be analyzed unless the reports covered both. The Court said it is proper to know "whether charges of expense are made against one part of a business which ought to be made against another" (page 216), and "how would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense" (page 213).

If in the present case these corporations had been asked to furnish statements respecting only their interstate business separate from their other transactions, the attempt at separation would have involved allocation of some items of expense and

apportionment of others, a verification of which would involve an examination of all the figures.

The case of *Terminal Taxicab Company* v. *District of Columbia* (241 U. S. 252), cited by the appellees, seems at first glance to sustain the proposition that if a corporation is in two kinds of business, one subject to regulation and the other not, the public authorities may demand information from it concerning only that branch of its business which is subject to regulation. That was a suit to restrain the Public Utilities Commission of the District from exercising jurisdiction over a cab company, part of whose business was that of a public service company and part of whose business was not, being the renting of cars to private individuals. An order of the Commission required the company to file reports giving schedules of its rates for all its business. The Court held that this information need not be furnished with respect to the renting part of the business, and said (page 256):

> There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in *Int. Comm. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, 211.

An examination of the *Terminal Taxicab Company* case shows that the order of the Public Utilities Commission *required only the filing of the schedule of rates in force.* It did not call for any

other accounts, or for any information respecting expense or profits, and consequently no showing was made that there was any commingling of accounts or that the information called for involved the analysis of figures relating to all of the company's business or any allocation or apportionment of expense. On this ground the *Taxicab Case* is clearly distinguishable from the present case.

With respect to the demand for information as to the cost of production of merchandise sold by these corporations in interstate or intrastate commerce, it seems clear that if Congress has power to ask for reports of their interstate business it may require complete information, and among the items of information which may be asked for is information with respect to prices charged and profits made in interstate commerce. Though Congress may not fix prices and thus regulate the profits of these companies, it does not follow that Congress may not be entitled to obtain information with respect to profits. The public is vitally interested in the prices and profits of these concerns, and the principal object of legislation affecting combinations in restraint of trade and regulating interstate commerce is because of the effect on prices, and information respecting prices charged and profits made in interstate commerce is of vital importance in dealing with commerce. If it once be conceded that Congress has power to ascertain from these companies what profits they

are making in interstate commerce, then it necessarily follows that it may learn about their costs. If all the merchandise these companies sold in interstate commerce were purchased by them, their costs would be represented by the prices they paid, but where, as in this instance, they manufacture what they sell in interstate commerce, it is difficult to see how the profits made in interstate commerce may be arrived at without some information as to the cost of manufacture.

Plant capacity, production, and unfilled orders are not matters of accounting or subject to the argument relating to commingling of accounts, but have a very direct bearing on the interstate commerce conducted by these corporations. If they were found to be making large profits and if their plants were partly idle, influences affecting interstate commerce requiring action or legislation would be indicated. If, on the other hand, high prices and large profits were accompanied by figures showing that production equaled plant capacity and unfilled orders at the end of each month were increasing, it would merely show that demand was outrunning supply.

III

Construction of the Federal Trade Commission Act

The contention that the Act does not give authority to the Commission to require reports from corporations engaged in interstate commerce where

there is no pending charge of misconduct or violation of law, and the only purpose is to obtain statistical information useful in pointing out needful legislation or enabling the Commission to see whether particular investigation may be needed, is untenable. The terms of the Act and its legislative history point irresistibly to the other conclusion.

Section 6 provides that the Commission shall *also* have power—

> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce * * *.
>
> (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission, in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing * * *.
>
> * * * * *

> (f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use. [Chap. 311, 38 Stat., pp. 717, 721, 722.]

These provisions are clear and set forth independent powers and duties which have no necessary relation to pending proceedings to investigate complaints of unfair methods of competition, dealt with in other sections of the Act. Indeed, the requirement of *annual* reports is utterly inconsistent with the idea that the information which may be asked for is only for use in connection with some particular pending investigation.

The Deficiency Appropriation Act approved November 4, 1919 (Chap. 93, 41 Stat. 327, 328), may not have added anything to the powers of the Federal Trade Commission, because it expressly provides for expenditures "within the scope of its powers," but it shows the understanding of Congress that in calling for information respecting foodstuffs and other necessaries the Commission would be acting "within the scope of its powers" if it inquired into "production, ownership, manufacture," and "storage," with "figures of cost"

and prices, at least where such matters have any bearing on interstate commerce, and the information is requested from corporations engaged in interstate commerce.

The case of *Harriman* v. *Interstate Commerce Commission* (211 U. S. 407) is no authority for the construction of the Federal Trade Commission Act demanded by the appellees. In that case the Interstate Commerce Commission had under investigation relations between carriers and brought before it a director of the Union Pacific and asked him regarding his dealings in the stock of the company, and he declined to answer. The Court held that the Interstate Commerce Act did not authorize the Commission to subpœna witnesses and compel them to testify except in cases where the Commission was exercising quasi judicial powers in proceedings to enforce the Act. The Court did not hold that under the Act the Commission did not have the power to require reports from the corporations themselves. The Court referred to the section of the Interstate Commerce Act authorizing the Commission to require reports from carriers and said (page 422):

> All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the commission may make without that aid but with the help of such

> returns or special reports as it may require from the carrier, we need not decide.

In the *Goodrich Transit Company* case (224 U. S. 194, 212) it was said of the *Harriman* case:

> The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court.

In the case of *Baltimore Grain Company* (284 Fed. 886) cited by appellee, the Federal Trade Commission demanded inspection of all books, papers, and private correspondence covering a period of a year, and it was held that the Act was not intended to give the Commission such power. The court brings out the distinction between the power of inspection and subpœna (indicating that it is limited to cases where a corporation is being "investigated" or "proceeded against") and the power of calling upon corporations engaged in interstate commerce to file reports. It may be that the power of the Commission, under Sections 9 and 10 of the Act, to subpœna witnesses and take depositions is limited to cases where there is a pending proceeding, but the power given in Section 6 to require annual and special reports and answers to inquiries is not so limited.

As Congress has power to require the disclosure of information relating to business of these companies that is not interstate commerce where the

accounts are commingled or the facts have a direct bearing on their interstate commerce, the provisions of the Act authorizing the Federal Trade Commission to require information respecting business of any corporation engaged in interstate commerce are plainly broad enough to authorize the Commission to require information respecting the business of these companies which is not interstate commerce, where the accounts are commingled or where the facts have a direct bearing on their interstate commerce business.

Finally the legislative history of the Act completely refutes the labored argument that Congress intended that the Commission could only require the production of information for use in pending proceedings to investigate specific charges of unfair competition or violation of the antitrust acts.

The manifest purpose of Congress in enacting the above-quoted paragraphs in Section 6 was to reenact (with added powers) Section 6 of the Act to establish the Department of Commerce and Labor, which section created the Bureau of Corporations and defined the powers of the Commissioner of Corporations. This purpose was expressly declared in the early draft of the bill to create the Federal Trade Commission. (H. R. 12120, 63rd Cong., 2d Sess.; S. 4160, 63rd Cong., 2d Sess.; H. R. 15613, 63rd Cong., 2d Sess.)

Congress intended to continue in the Federal Trade Commission the power of the Commissioner

of Corporations to investigate the business of corporations engaged in interstate commerce without regard to any specific proceeding, and make reports and recommendations to Congress, and to add to that power the power to require such corporations to make annual and special reports and answer inquiries, a power which the Commissioner of Corporations did not have.

Section 6 of the Act creating the Department of Commerce and Labor provided (Chap 552, 32 Stat., pp. 825, 828):

> The said Commissioner [of Corporations] shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation * * * engaged in commerce among the several States * * * and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce * * *.

In the only decision of a court construing the Act creating the Bureau of Corporations it was said:

> It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such

remedial legislation as might be found necessary. I regard this as the primary purpose, the chief purpose, a legislative purpose. It is clear from the act itself that, if there be a secondary purpose, the primary purpose, the legislative purpose, was vastly more important in the mind of Congress than any other. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them, in case they needed strengthening. In my judgment, the purpose of every one of these laws, the high aim of Congress in passing them, was a determined purpose that the corporation, the creature of the law, should not be allowed to grow beyond the law. The commerce and labor act is the repeated attempt of Congress to bring to its aid such information as would enable Congress to do whatever might be necessary for the control of corporations. Perhaps a secondary purpose was the punishment of offenders. It is perfectly clear to my mind that this was not the main purpose, because there were abundant laws already on the statute books for that, and a great department skilled in the work of punishing offenders. And still I am not able to say but that a secondary purpose of the commerce and labor act might have been the punishment of offenders. And I say this because it is not inconsistent with the act, or with the declared primary purpose, that this should be done so far as

> the corporation itself is concerned. [*United States* v. *Armour & Co.*, 142 Fed. 808, 819.]

The House Committee on Interstate Commerce, in reporting the Federal Trade Commission bill to the House, said:

> In section 3 the bill transfers to the commission all of the powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations. The broadest powers of that bureau and of the Commissioner of Corporations are embraced in the general provision of the law creating that bureau to investigate the organization, conduct, and management of the business of corporations, and to gather information and data to enable the President to make recommendations to Congress for legislation for the regulation of interstate commerce. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., p. 2.]

It was further said:

> It must be remembered that this commission enters a new field of governmental activity. The history of the Interstate Commerce Commission is conclusive evidence that the best legislation regarding many of the problems to come before the interstate-trade commission will be produced from time to time as the result of the reports of the commission after exhaustive inquiries and investigations. No one can foretell the extent to which the complex interstate business of a great country like the United

> States may require, alike for the benefit of the business man and for the protection of the public, new legislation in the form of Federal regulations, but such legislation should come by a sound process of evolution. Even the control of the railways in this country by the Interstate Commerce Commission affords no complete parallel to administrative control of the industrial corporations of the country by a Federal commission. It is largely the experience of the independent commission itself that will afford Congress the accurate information necessary to give to the country from time to time the additional legislation which may be needed. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., p. 8.]

The Report of the Committee also said:

> While the powers, authority, and duties conferred upon the Bureau of Corporations and the Commissioner of Corporations are broad, there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce.
>
> * * * * *
>
> Therefore, in section 9 of the bill annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial condi-

> tion, and general business conduct of those concerns. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., pp. 2, 3.]

A further statement by Mr. Covington is as follows:

> If the gentleman was present during the early part of my remarks he must recall that I pointed out, at least to the best of my ability, that the power to gather the annual reports and the special reports which are to comprise the great body of information, producing that publicity which a great many men in America believe will be a great and salient safeguard for honest business in the future, is not a power now possessed by the Bureau of Corporations. [51 Cong. Rec., Part 9, 63d Cong., 2d Sess., p. 8848.]

Further light on the intent of Congress is found in other parts of the House Committee's Report, printed as Appendix A to the original brief of the appellants.

The powers set forth in Section 6, which the appellees contend are merely incidental, were, in the form in which the bill was originally drawn, unassociated with any power to deal with unfair competition, as the power of investigating unfair methods of competition was added by amendment. (H. R. 15613, 63d Cong., 2d Sess.)

The constitutional question can not be avoided by any interpretation of the Act. To construe

the Act as limiting the authority of the Commission to require reports to occasions where it has under consideration some particular charge of misconduct, or breach of existing law, is to distort its language and ignore the intent of Congress, so plainly apparent from its Journals.

CONCLUSION

These considerations and others mentioned in the original brief justify the conclusion that the power of Congress to require the disclosure by corporations engaged in interstate commerce of information respecting their private affairs is not limited to cases where some specific legislation is under consideration, or to cases where some legal or other proceeding is pending involving an investigation of a charge of violation of law, but that such information may be called for in the form of periodical reports and that an appropriate method of obtaining such information is through the agency of a commission such as the Federal Trade Commission; that such information must be, if Congress requires it, complete information, and if the corporations in question are engaged in other activities, information with respect to them may be properly demanded where their accounts are commingled or the facts have a direct relation to or bearing upon their interstate business; that such power exists as the result of the power to regulate commerce and the right of the legislative body to inform itself with respect to subjects

within its jurisdiction and power to legislate upon; and that, under all the circumstances of this case, the character of the corporations involved and the nature of their business, the requirement of periodical monthly reports in the form submitted did not involve an unreasonable invasion of the right of privacy or an unreasonable search or seizure under the Fourth Amendment, and that having this power, it is evident from the provisions of the Federal Trade Commission Act that Congress intended that it should be exercised through the Commission.

If complainants feel that the Federal Trade Commission is invading to an undesirable extent the privacy of corporations engaged in interstate commerce, the remedy lies with Congress and not with the courts.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
W. H. FULLER,
Chief Counsel Federal Trade Commission.
ADRIEN F. BUSICK,
Attorney for the Federal Trade Commission.
OCTOBER, 1925.

Appendix A

"An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914 (Chap. 311, 38 Stat., pages 717 et seq.).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the com-

mission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of $10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of $5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prose-

cute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" means all documents, papers, and correspondence in existence at and after the passage of this Act.

"Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"Antitrust acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of

an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law

so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of

the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method

of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by reg-

istering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the

commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publica-

tion of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation sub-

ject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require, by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the

court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for

the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall will-

fully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

APPENDIX B

"An Act Making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1920, and prior fiscal years, and for others purposes," approved November 4, 1919 (Chap. 93, 41 Stat., pages 327 et seq.).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiences in appropriations for the fiscal year ending June 30, 1920, and prior fiscal years, and for other purposes, namely:

* * * * * * *

FEDERAL TRADE COMMISSION

For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, or within the scope of its powers, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessaries, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices, $150,000.

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APPELLEE'S

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923

NO. [redacted] 4 /

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK, HUSTON THOMPSON, *et al.*, etc.,

Appellants,

against

CLAIRE FURNACE COMPANY, RELIANCE COKE COMPANY, *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

PAUL D. CRAVATH,
HOYT A. MOORE,

Of Counsel.

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CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK, HUSTON THOMPSON, *et al.*, Etc., *Appellants,* *against* CLAIRE FURNACE COMPANY, RELIANCE COKE COMPANY, *et al.*, *Appellees.*	October Term, 1923 No. 250.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This cause originated in the Supreme Court of the District of Columbia upon a bill of complaint against the Federal Trade Commission and the members thereof as such to restrain the prosecution of certain demands by the Commission for reports and answers from the several appellees. A temporary restraining order was issued. The appellants (to whom hereinafter we shall refer as the Commission) filed an amended answer which in large measure admitted the allegations of specific facts and pleaded various propositions of law and legal conclusions from the facts alleged in the bill or in the answer. The appellees moved to strike out certain matters from the answer and also to strike the entire answer from the files.

The District Supreme Court, with a view to avoiding further litigation and of bringing about a prompt settlement of the matters of public interest involved in the cause, denied the motion to strike out parts of the answer without prejudice to the appellees. It granted the motion to strike out the entire answer on the ground that it did not state a defense, and enjoined the Commission from prosecuting its demands for the reason that the Commission could not constitutionally be authorized and had not been authorized by law to require or demand the reports and answers or that it be furnished with the information and data demanded by it. (Record, page 100.) The Commission appealed to the Court of Appeals of the District of Columbia, which sustained the decree of the District Supreme Court. Thereupon the Commission prosecuted this appeal from the judgment of the Court of Appeals.

The pleadings in the case are voluminous and an analysis thereof in sufficient detail to bring into relief the issues of fact raised thereby would of necessity be elaborate. The motion to strike out the answer is, however, based upon a few principles of law which the answer endeavors to controvert but which, if sound, must render unnecessary any lengthy statement or exhaustive consideration of such facts as might by the pleadings have been put in issue. Such facts as are not fully set out in the Brief for Appellants and are necessary to a proper presentation of the legal issues involved in this appeal are as follows.

Statement of Facts.

The appellees are twenty-two corporations organized under the laws of various States, in which States or in some one or more other States *the respective appellees are engaged in the manufacture of coke or various products of iron or steel from coal or iron ore mined or purchased by them.* (Record, pages 2, 3, 6 and 7.) *This is not*

denied in the answer. None of the appellees appears to be in the business of mining coal or iron ore for the general market; some of them which produce coal and iron ore for their own use also purchase additional coal or ore. (Record, pages 6 and 7.) Certain of the appellees manufacture pig iron; others manufacture coke from coal mined by them; others manufacture pig iron and various steel products; one appellee manufactures only car wheels and locomotive tires, another only tin plate; other appellees either directly or through subsidiary or affiliated companies produce coal and iron ore and manufacture coke, pig iron and various steel products, either crude steel or in some cases semi-finished steel products and in others finished steel products of various kinds. (Record, pages 6 and 7.) In general, the appellees can roughly be classed as producers of pig iron or of coke or of steel products and some of the appellees produce all three.

Those appellees which mine coal or ore ship a part thereof to their coke plants or iron furnaces, which in some instances are in the respective States where the coal or ore is mined and in other cases are in different States and thus interstate shipments are involved. The coal and ore purchased by some appellees may in some cases also involve interstate shipment. The pig iron and steel products manufactured by some of the appellees are to some extent sold and shipped out of the respective States where manufactured. The percentage borne by such shipments to the total shipments of the several appellees varies greatly as to different products and as to different appellees. (Record, pages 5 to 7.) Notwithstanding that the Commission makes specific allegations as to such respective percentages (Record, page 79) and clearly recognizes the distinction between the manufacturing and mining of the appellees and their commercial transactions, it alleges in the answer (Record, page 79) that the interstate and intrastate commerce of each appellee is conducted as a single non-separable whole. The Commission did not differentiate between

interstate and intrastate commerce in any of its inquiries. (Brief for Appellants, page 5.)

It is, however, apparent that all the appellees are manufacturing corporations the interstate commerce of which consists solely in the purchase and shipment from one State to another of some raw materials and the sale and like shipment of some manufactured products.

The fundamental claim of the Commission is that such purchases and sales and such shipments bring the appellees within the jurisdiction of the Commission as corporations engaged in interstate commerce and that therefore from them the Commission can require complete information as to all their business, both interstate and intrastate, including production and manufacturing costs. (Record, page 80.)

The Commission on December 15, 1919, adopted a preamble and resolution (Record, page 11) wherein it was recited that the Committee on Appropriations of the House of Representatives had asked the Commission to suggest what the Commission might do to reduce the high cost of living and that the Commission had recommended to the Committee that it would be desirable to obtain and publish current information with respect to food stuffs and other necessaries and particularly with respect to certain basic industries, including coal and steel, and that as a consequence the Committee recommended and Congress appropriated $150,000 for the Commission for the fiscal year then current. The Commission thereupon resolved, "by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission Act," to proceed to collect and publish such information with respect to such basic industries as said appropriation and other available funds would permit and that such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke and pig iron industries. The Federal

Trade Commission Act and the paragraphs of section 6 thereof above referred to will for brevity hereinafter sometimes be referred to as the Act and as paragraph (a) and paragraph (b), respectively.

The Commission then served upon the appellees engaged in manufacturing iron and steel an order (Record, page 12) reciting that the Commission, pursuant to such resolution, under the powers conferred upon the Commission in paragraphs (a) and (b) and in consideration of a special appropriation by Congress for such purposes, required the appellees to report their monthly costs of production for various products and other data as specified in forms enclosed with the order. The order called for monthly reports, except as to balance sheet and income statement which were to be annual, for each month of the calendar year 1920. Like orders were served upon the appellees engaged in mining coal and manufacturing coke. Attached to the forms enclosed with the order was a notice embodying paragraph (b) and the provisions of section 10 of the Act covering false reports and failure to make reports required by the Act. (Record, page 13.)

The data referred to in the order and to be covered by monthly reports on the forms enclosed therewith consisted of

> (1) statements of the quantities of forty-four specified products produced at each plant of the several appellees, which products vary from raw materials like coke to crude products like pig iron and steel ingots and finished steel products like rails, structural shapes, cotton ties and wire nails;
>
> (2) cost sheets covering twenty-five specified products for each battery of ovens or furnace, mill or other type of operation;
>
> (3) statements of sales prices, meaning "the actual realization f. o. b. mill, after deduction of freight allowances made to purchaser," with respect to nineteen specified products, including separate

reports thereon in respect of domestic and export shipments;

(4) statements of the contract prices, meaning "the base price less freight allowances to be paid by purchasers and to be deducted from invoices," with respect to the same nineteen products, contracts being defined as including all agreements whether by formal, written instruments or orders booked, an explanation being required to be furnished of any unusual prices;

(5) statements of the capacity of the ovens, furnaces, works and mills in respect of eighteen specified commodities;

(6) statements of orders booked during the month and the quantities of unfilled orders outstanding at the end of each month in respect of the same nineteen commodities the sales and contract prices of which were to be reported;

(7) statements of the depreciation and general administrative and selling expenses allocated to seventeen specified commodities and an income statement covering sales, cost of sales, depreciation, general and administrative and selling expenses, net income from operations, income from other sources, deductions from net income, balance of net income transferred to surplus, with details of the income of the appellees from interest, rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies and income from outside investments and details of deductions from net income for Federal taxes, interest on bonds, interest on notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization of excess cost of construction, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officers. (Record, pages 15-34.)

The forms enclosed with the orders served upon the appellees producing coal and coke called for similar information in the same exacting detail as to the internal

affairs of the corporations. (Record, pages 37-54.) In each case the Commission provided in its orders for subsequent inspection of the books and accounts from which the reports should be made. (Record, page 8, admitted in Answer, Record, page 80.)

The inquiry thus covered production figures and capacities, costs, sales prices, amount of business booked and completed and the corporate financial affairs, with no limitation to interstate transactions and no questions thereon.

The appellees not having complied with these orders, the Commission served further orders and demands upon them, including a notice under date of May 6, 1920 (Record, page 62), that the reports from the iron and steel industry were overdue for January, February and March in that year and that the Commission would continue to require such reports notwithstanding the decision in the *Maynard Coal Company* case. In that case the Supreme Court of the District of Columbia had restrained the Commission from proceeding against Maynard Coal Company for failure to furnish the above described reports. In such letter it was stated that "The Commission believes that this information is useful and important to the general public and also to the iron and steel industry."

The Commission having indicated its determination to require reports notwithstanding such decision and having directed the attention of the appellees to the penalties provided by the Act for failure to comply with orders of the Commission, the appellees thereupon filed their bill of complaint to restrain further proceedings by the Commission in respect of such orders. On the same day the Commission instituted a mandamus action to compel one of the appellees to file the required reports and within a few days instituted a similar action against another of the appellees, which actions are stayed pending the determination of this cause. The complaint was, therefore, not filed as the result of those actions, as intimated in the Brief for Appellants (page 2).

No complaint of any violation of any law, whether Federal or State and whether or not one in which the Commission could properly be interested, had been filed against the appellees by or with the Commission. (Record, page 5.) The Commission, notwithstanding the reference to paragraphs (a) and (b), averred in its answer that it sought the information for all the purposes authorized by law and based its authority to require the information also upon paragraphs (f) and (g) of section 6 and on section 9 of the Act and on all the authority conferred upon it by Congress. (Record, page 78.) Among the purposes specifically avowed were the gathering of the desired information for publication, the regulation of the interstate commerce of the appellees by such publication of facts relating to all the business of the appellees and the making of reports to Congress and recommendations for additional legislation. (Record, pages 78-79.) The answer also averred (Record, page 79) that all the desired information was necessary and had a direct relation to the regulation and control of the interstate and foreign commerce of the appellees, in which it was alleged sixty-five per cent. or more of the sales by each of the appellees (except three) were made, and that the interstate and intrastate commerce of each appellee was conducted as a non-separable whole.

The answer consisted largely of averments as to the power of Congress to secure information and as to the grant of such power by Congress to the Commission, the gist of the answer being that when a mining or manufacturing corporation sells any part of its product in interstate commerce all the business of such corporation is thereby subject to inquiry by the Commission and regulation by Congress, particularly if the interstate cannot be separated from the intrastate business of the corporation. Great stress was laid upon the importance of coal and steel in the industrial and commercial life of the several States and in one of its argumentative averments the Commis-

sion specifically said that the appellees were engaged in a business which "by reason of the nature thereof and its relation to the need of organized society, is charged with a public interest and is subject because of that interest as well as because of its appearance in part, at least, in interstate commerce to the right of* the power of the Congress to obtain information with relation to the whole of the industry * * *." (Record, page 83.)

The Questions at Issue.

The averments of the answer consisted so largely of statements as to the law and legal conclusions based on such statements that it brought in issue no questions of fact requiring proof before the case could be determined, hence the motion to strike the answer from the files. In large measure, it is an argument upon the right of the Commission to pursue the inquiry which it started. This argument is based on the following premises:

(1) That, inasmuch as Congress has complete power to regulate interstate commerce, it can require any information which it may desire from any corporation engaging in interstate commerce as the result of engaging therein. (On this premise the power claimed is not limited to corporations although perhaps Congress might, if it possesses such power, reasonably distinguish between corporations and individuals.)

(2) That Congress has authority, under its power to regulate interstate commerce, to require information as to the interstate commerce conducted by any corporation and, if such corporation is also engaged in intrastate commerce, to require information as to such intrastate commerce, particularly if both are conducted as a unit and

*'and' in the original amended answer.

the two phases can not be separated. (If the existence of such power be granted, this also would appear to apply to individuals although Congress might conceivably distinguish between individuals and corporations in some of its requirements.)

(3) That in the case of corporations engaged in the production or manufacture of products that enter into interstate commerce, the Commission, by virtue of the power of Congress to regulate interstate commerce, has authority to require such corporations to furnish information regarding the production and manufacture, as well as the sale, of their products.

(4) That Congress can authorize a commission to compel the giving of information and the production of documents in any inquiry which such commission may desire to make upon any subject in respect of which Congress may have any power of legislation.

(5) That the industry in which the appellees are engaged is charged with a public interest and for that reason Congress has power to require full information in respect thereof.

The objections of the appellees to furnishing the information required are based upon these principles:

(1) That, *except perhaps as to its sales and purchases in interstate commerce,* ***Congress has no power to regulate, and therefore has no authority to inquire into, the business of any of the appellees and has not intended to, and could not lawfully, delegate to the Commission authority to make inquiry into such business except in respect of a reasonably suspected violation of Federal law;***

(2) That the sales of finished products and the purchases of raw materials are entirely separate from the manufacture or mining in which the several appellees are engaged and for any lawful purpose of the Commission any proper information in respect of such sales or purchases can be secured separately;

(3) That the unauthorized examination into the business affairs of the appellees is a violation of their rights protected by the Fourth Amendment to the Constitution and is in contravention of the Tenth Amendment, since it involves the enforced surrender of information of a private character not for any proper national purpose and requires the exercise of a power not delegated to Congress;

(4) That even if the Commission can require information regarding the appellees' prices in respect of interstate sales it has no authority to require such information regarding intrastate sales, which are clearly capable of being distinguished from interstate sales, the allegation to the contrary in the answer being a conclusion of law and not a statement of fact;

(5) That Congress itself has no jurisdiction, and did not and could not give to the Commission authority, over any industry as a whole which, unlike such industries as transportation, affects interstate commerce only through the purchase of raw materials and the sale of finished products requiring shipment in interstate commerce; and

(6) That Congress can not authorize an administrative body to make an investigation of an industry in all of its phases simply because Congress may have power to legislate in respect of some of its phases.

The appellees are contesting this cause not merely to protect their own rights but because of the conviction that

the cause is of supreme importance to themselves and to all other citizens, involving as it does fundamental rights secured by the Federal Constitution and the exercise of unwarranted power by a Federal authority in subjects which have never been entrusted to the dominion of the Federal Government. The position of the appellees is in substance (1) *that Congress has not attempted to give and has not given to the Commission such authority as the Commission seeks to exercise and* (2) *that the Federal Government has no such jurisdiction over the business of the appellees as is sought to be exercised by the Commission.*

ARGUMENT.

I.

Congress has not conferred upon the Commission any such power as the Commission seeks to exercise in requiring the information called for.

The Commission has not received any grant of authority applicable to the matter in issue other than such as is contained in the Act, although from the references made by the Commission to the appropriation by Congress above referred to it would seem that some such authority is claimed to derive therefrom.

A. The sole source of authority of the Commission is the Federal Trade Commission Act.

If the Act has not granted to the Commission power to investigate an *industry* generally or the *intrastate* business of corporations, the Commission has no such authority. There is no other enactment of Congress which purports to give to the Commission any such authority. In the

preamble to the resolution of the Commission above mentioned, the Commission referred to the Deficiency Appropriation Act of November 4, 1919. This included a grant of $150,000 to the Commission

> "For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, or within the scope of its powers, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessaries, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices, $150,000." 41 *U. S. Statutes*, 328.

The President has no inherent power to investigate corporations and we know of no power under which, by virtue of his office alone, he can direct to be made such investigations as are here attempted. However this may be, there is no allegation in the pleadings that the President has directed the Commission to collect the information which it is endeavoring to collect. Therefore the action of the Commission cannot be based upon the reference in the Appropriation Act to the direction by the President. We are unable to apprehend how this clause can be other than the grant of money to carry on investigations, on particular matters to be selected by the President, under powers assumed already to exist.

A grant of funds to the Commission to collect information "within the scope of its powers" of course confers no authority not previously possessed, so that in this respect the Commission is thrown back upon the Federal Trade Commission Act as the source of its authority.

From the very recital in the preamble quoted in the order of the Commission it appears that the Commission recommended an investigation as to *foodstuffs* and *other necessaries* and *particularly with respect to various basic industries, including coal and steel.* Yet Congress in mak-

ing its appropriation says nothing of basic industries or of coal or steel but speaks only of *foodstuffs and other necessaries.* If the preamble throws any light upon the purposes of the appropriation, it is dim in comparison with the shadow cast by it upon any implication that Congress granted power to investigate basic industries. The very industries which the Commission specially mentioned and which it endeavors to investigate are not mentioned by Congress, which names only *foodstuffs and other necessaries.* It seems clear that Congress was appropriating funds for an investigation into the high cost of foodstuffs and other necessaries of life of the same general character, not steel billets, coke or pig iron.

As the appropriation was to be used in investigations directed by the President or within the scope of the powers of the Commission and there is no indication in the pleadings that the President has given any directions as to the present undertaking of the Commission, it must find its authority within the scope of such powers as it possessed outside the Appropriation Act. Thus, clearly, the Commission can derive from that Act no authority for its present unprecedented venture.

B. The Federal Trade Commission Act does not purport to authorize the Commission to make a general investigation of an industry or intrastate business in any case.

The Act was approved on September 26, 1914, as part of the legislative program of President Wilson for the regulation of interstate commerce. The Clayton Act, which was approved a few weeks subsequently as another part of such program, was intended to cover certain objectionable practices deemed to be injurious to interstate commerce and forbade specifically the use of such practices in interstate commerce or so as to affect such commerce. The Act with which we are concerned covered two specific difficulties: (1) those practices of various kinds which were

deemed to be injurious to interstate commerce through interference with the freedom of competition therein and were so multifarious as in the opinion of Congress not to be susceptible of classification and specification and (2) the inability of business men to ascertain except through long and expensive litigation, often involving them as defendants in criminal prosecutions, what is or is not permitted by the Anti-Trust Laws. The first difficulty was intended to be met by declaring the objectionable practices to be unlawful and the second difficulty by the establishment of a Commission to which business men could look for guidance as to border-line practices and which could make investigations to determine whether or not the Anti-Trust Laws and the prohibition of unfair practices were being obeyed. There is no intimation in the Act that Congress deemed it within its power or intended in any regard to assume general jurisdiction over corporate enterprise. *The Act relates exclusively to commerce as defined in the Act and in so far as it affects corporations it affects only those which are engaged in such commerce and those only to the extent that they are therein engaged.*

1. Analysis of the Act.

Sections 1, 2 and 3 deal with the establishment of the Commission and the transfer to it of the organization and work theretofore carried on by the Bureau of Corporations. Section 4 is devoted to definitions. Commerce is therein defined as follows:

> "'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Corporation is so defined as to include any association, whether incorporated or not and whether issuing stock or not, except partnerships, organized to carry on business for profit. The terms "Acts to regulate commerce" and "Anti-Trust Acts" are also defined in the section.

In Section 5 is found the only addition to substantive law made by the Act, this addition being the declaration that unfair methods of competition in commerce are unlawful. The section then proceeds to empower the Commission to prevent the use of such methods in commerce and provides machinery for the enforcement of the new law by the Commission.

Section 6 provides that the Commission shall also have power

> "(*a*) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of *any corporation engaged in commerce* excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations and partnerships;
>
> "(*b*) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe and shall be filed with the commission within such reasonable period

as the commission may prescribe, unless additional time be granted in any case by the commission.";

(*c*) To investigate the manner in which any decree in any suit under the Anti-Trust Acts is being carried out and to report thereon to the Attorney General or to make public its reports;

(*d*) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the Anti-Trust Acts by any corporation;

(*e*) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts;

"(*f*) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest"; to make annual and special reports to Congress and recommendations for additional legislation and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use;

(*g*) To classify corporations and to make rules and regulations for the purpose of carrying out provisions of the Act; and

(*h*) To investigate trade conditions in and with foreign countries where associations, combinations or practices or other conditions may affect the foreign trade of the United States and to report to Congress thereon with recommendations.

Section 7 authorizes courts, if after the taking of testimony the complainant shall be found entitled to relief, to refer to the Commission any suit in equity brought by or under the direction of the Attorney General as provided in the Anti-Trust Acts in order that the Commission may report an appropriate form of decree.

Section 8 requires the several Departments and Bureaus of the Government, when directed by the President, to furnish the Commission upon its request all records, papers and information in their possession relating to any corporation subject to any of the provisions of the Act.

Section 9 provides that *for the purposes of the Act* the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of *any corporation being investigated or proceeded against*, and power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. The Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Upon the application of the Attorney General, at the request of the Commission, the district courts of the United States have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the Commission made in pursuance thereof. The Commission may order testimony to be taken by deposition *in any proceeding or investigation pending under the Act.*

The section also provides that evidence shall not be withheld on the ground of incrimination and that no enforced testimony shall be used in prosecution of a witness, except for perjury.

Section 10 provides punishment for refusal to testify or "to answer any lawful inquiry" or to produce documents or make reports and similar punishment for false entries or statements in any report or for any false entry in any account, record or memorandum kept by any corporation subject to the Act, or for failure to make full,

true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation. Any officer or employee of the Commission who, without its authority, shall make public any information obtained by the Commission, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Section 11 provides that nothing in the Act shall be construed to prevent or interfere with the enforcement of the Anti-Trust Acts or the Acts to regulate commerce or to alter, modify or repeal such Acts.

2. *Scope of the Act.*

It thus appears that of the eleven sections the first three relate to the organization of the Commission, the fourth is taken up with definitions, the fifth declares unlawful unfair methods of competition in commerce and prescribes the procedure for dealing therewith, the sixth and seventh deal with powers of the Commission, the eighth covers the relations of other departments of the Government to the Commission, the ninth deals with investigatory powers of the Commission, the tenth provides penalties for interference with the carrying out of such powers and the eleventh relates to other statutes. Thus it is clear that the entire statute deals with only two things, the organization of the Commission and the legislation against unfair methods of competition in commerce and that the Commission was given no powers except (1) to secure information, (2) to assist in anti-trust litigation or (3) to prevent the use of the forbidden unfair methods.

It will be noticed that the Act as a whole deals exclusively with commerce and particularly with the

interferences therewith condemned by the Anti-Trust Laws and by section 5 of the Act. Except for paragraphs (a), (b), (f), (g) and (h) of section 6, all the powers granted to the Commission deal with the enforcement of section 5 or with assistance to the courts or to the Attorney General in respect of violations of the Anti-Trust Laws. In considering the question here involved, that is, the function of the Commission as an investigatory body, only sections 4, 5, 6, 9 and 10 directly affect the problem and of these only sections 5, 6 and 9 purport to grant authority to the Commission.

The power granted in section 5 is limited to dealing with unfair methods of competition. The section gives no specific power to investigate except upon a complaint, when hearings are to be had. It is evident that section 9 grants no original authority independent of the other sections of the Act since any authority exercised under section 9 must be exercised for the purposes of the Act, which purposes must be sought elsewhere in the Act. The matter regarding which evidence can be required must be one under investigation and the corporation to the documents of which the Commission may have access must be one being investigated or proceeded against under the authority of some other section of the Act. *Any independent power of investigation which the Commission may have must, therefore, be found not in section 9 but in section 6.*

3. Section 6 Must be Construed as a Part of an Entire Statute.

Of the eight separate powers distinguished in section 6, three (c, d and e) relate to violations of the Anti-Trust Acts and one (h) relates to foreign commerce; the first two (a and b) authorize the securing of information

concerning corporations *engaged in commerce;* another (f) covers the publication of such information and reporting thereon to Congress and another (g) authorizes the classification of corporations. The question, therefore, narrows itself to this: Does section 6, and particularly do paragraphs (a) and (b) thereof, confer upon the Commission power to examine the affairs of a corporation entirely regardless of the other sections of the statute or in disregard of the applicability of section 5 or the Anti-Trust Laws to such corporation or to the character of the business being examined? In other words, is the Commission authorized under section 6 to proceed like the Census Bureau simply to gather information concerning corporations or is its power under paragraphs (a) and (b) related to the other sections of the Act? It is clear that this question cannot be answered merely by directing attention to paragraphs (a) and (b) and ignoring all the remainder of the Act, for under the general rule of construction the meaning of a section of a statute must be gathered by construing it in its relation to the statute as an entirety.

In *Brown* v. *Duchesne*, 19 Howard, 183, Mr. Chief Justice TANEY used this language, page 194:

> "The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its

> various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."

How this principle is applied is well illustrated in the case of *United States* v. *Jin Fuey Moy,* 241 U. S., 394, which involved possession of a drug by a person not registered as belonging to one of those classes permitted to possess such drugs. Section 8 of the statute in question provided penalties for the possession of such drug by any unregistered person. The Court construed the words "any person not registered" in section 8 as meaning any person of the classes named in section 1. The words certainly did not say that but the Court properly sought the sense of the words by examining the entire statute and considering the design shown by the statute as a whole.

Even upon an examination of the two paragraphs (a) and (b) alone it appears, however, that the information to be procured is from corporations *engaged in commerce.* In the lower Courts it was openly contended on behalf of the Commission that this includes information as to any business of any corporation engaged in commerce *in any degree,* since any corporation by so engaging subjects itself and all its affairs to the investigatory power of the Commission. The argument in the Brief for Appellants is more subtle but the contention still is made by implication. Such argument would require the ignoring of all the references in the other paragraphs of section 6 and in other sections of the Act to violations of the Anti-Trust Laws and the complete ignoring of the only substantive provision of the Act, the heart of the Act, section 5.

There are at least three possible constructions of paragraphs (a) and (b) which do no such violence to the Act as a whole as is wrought by the construction offered by the Commission.

4. *Possible Constructions of Section 6.*

(*a*) In the case of *United States* v. *Basic Products Company*, 260 Fed., 472, these paragraphs were considered by Judge ORR, of the Western District of Pennsylvania. The Commission there sought by mandamus to procure information as to the costs of production of an article sold in interstate commerce, the purpose being to furnish such information to the Navy Department, which was endeavoring to determine what would be just compensation for a quantity of such article ordered by it. The Court held that Congress did not intend to grant the extreme power of paragraphs (a) and (b) in respect of manufacturing corporations but only in respect of corporations *engaged in commerce as their principal function* and stated that there were corporations so engaged not covered by the Act to Regulate Commerce and not engaged in such commerce merely in the buying and selling of goods. The Court instanced corporations engaged in water transportation, lightering and forwarding. This interpretation of the paragraphs in question renders them applicable only to a special class of corporations among all those which have some interstate dealings and certainly accords with the language of the paragraphs and with the other sections.

(*b*) Under the second interpretation the paragraphs would be construed as authorizing an investigation into the commerce (as defined in the Act) of any corporation which in any way is engaged in such commerce. This would cover all the business of any corporation of the class referred to in the *Basic Products* case (those engaged exclusively in such commerce) and the part of the business of any other corporation to which the Anti-Trust Laws or section 5 can apply. Reason would thus be shown for including these paragraphs with the remainder of the Act because all relate to the legislation by Congress to secure freedom of competition in commerce, and the paragraphs

give power to ascertain whether such legislation is being obeyed. On the construction on which the Commission is proceeding we have first a mass of legislation dealing with restraints on competition in commerce and then an act adding a new story to the edifice and incidentally appointing a watchman to guard it but with power to roam near and *far* and unlimited rights to trespass.

(c) On the third interpretation the powers granted by paragraphs (a) and (b) would be more limited than under the second interpretation. In *Harriman* v. *Interstate Commerce Commission*, 211 U. S., 407, very similar provisions were construed as limiting the powers of the Interstate Commerce Commission in investigations to the purposes of the Act creating that Commission, which purposes the Court concluded *from the statute as a whole* to be the regulation of interstate commerce of common carriers. Therefore inquiries were held to be authorized only as to the affairs of such carriers relating to such commerce. In that case the Court was considering a statute under which the Interstate Commerce Commission claimed power similar to that claimed now by the Commission, namely, that it could make any investigation that it deemed proper, not merely to discover any facts tending to defeat the purposes of the Interstate Commerce Act but to aid it in recommending any additional legislation which it could conceive to be within the power of Congress to enact, and that in such an investigation it could with the aid of the courts require any witness to answer any question which might have a bearing upon any part of what it had in mind.

The investigation was started upon its own motion with no complaint before the Interstate Commerce Commission. A witness refused to answer questions as to whether he was interested in securities bought by a railroad company of which he was a director. The Interstate Commerce Act applied to common carriers in interstate commerce, required them to charge reasonable rates and otherwise

laid down rules for their governance and established the Interstate Commerce Commission with authority "to inquire into the management of the business of all common carriers subject to * * * this act" and to "keep itself informed as to the manner and method in which the same is conducted," with the "right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created" and "for the purposes of this act * * * to require, by subpoena, the attendance and testimony of witnesses and the production of papers relating to any matter under investigation." The Interstate Commerce Commission was specifically empowered to make recommendations to Congress concerning additional legislation which such Commission might deem necessary.

The Court held that the investigatory powers must be deemed to have been granted with the design of achieving the purposes of the statute—the regulation of interstate commerce carriers—and that inquiries must deal with violations of the statute. Three Justices dissented from the opinion that the witness need not answer but the dissent was on the specific ground that, as those Justices construed the statute, the questions related to a proper subject of inquiry, that is the relations of a director in an interstate carrier to such carrier. The dissenting Justices thus agreed with the principle of the majority, that the power to investigate must be deemed to relate to the other powers and to the purposes expressed in the statute.

The Court said (page 118):

> "Whatever may be the power of Congress, it did not attempt * * * to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. * * *
>
> "We are of opinion on the contrary that the purposes of the Act for which the Commission may

> exact evidence embraces only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; *in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.*" (Italics ours.)

Paragraphs (a) and (b) have been interpreted in accord with the *Harriman* case in every instance where the question has been presented to a court. In the *Basic Products Company* case, *supra*, the defendant urged the unconstitutionality of section 6 not only "in so far as it authorizes investigations and compulsory disclosure of matters which are beyond the commerce power of Congress," but also "in so far as it attempts to authorize a search or seizure by an administrative agency of the Government without charge or suspicion of wrongdoing." The Court said (page 482): "While the contention of counsel is probably sound, this court does not deem it necessary to go farther than to hold that the commission have not the power to carry on investigation which they have assumed in the present case."

In the case of *Federal Trade Commission* v. *P. Lorillard Co.*, 283 Fed., 999, in the District Court for the Southern District of New York, Circuit Judge MANTON was considering petitions of the Commission for mandamus for the production of records of certain tobacco companies in an investigation, at the direction of the Senate, into the tobacco trade. After quoting from the *Harriman* case, the Court said (page 1005):

> "The Interstate Commerce Commission deals with quasi public corporations. But the phrase of

the Federal Trade Commission Act considered, in view of the language in the Harriman Case, would indicate that the right to procure information in its investigations under the provisions of section 6 would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained." * * *

"This command of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the Commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitorial power over private corporations must keep within restrictions of the Fourth Amendment. 'Neither branch of the legislative department, still less any merely administrative body, established by the Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.' *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 478, 14 Sup. Ct. 1134, 38 L. Ed. 1047." * * *

"In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of section 6 would effectuate the intent of Congress and the procedure can be kept within constitutional limits. *United States* v. *L. & N. R. Co.*, 236 U. S. 318, 35 Sup. Ct. 363, 59 L. Ed. 598; *Veeder* v. *United States*, 252 Fed. 414, 164 C. C. A. 338. Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. See 51 Congressional Record, pt. 13, 63d Cong., Second Session, pp. 12747, 12800, 12806-11, 12918, 12927. It was not intended to grant an unlimited power

> of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing."

In *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886, District Judge ROSE, of the Maryland District Court, was considering a mandamus petition by the Commission to compel certain grain dealing corporations to produce all their records relating to their interstate commerce and their correspondence with jobbers during 1921. No complaint was pending. After suggesting that possibly the Commission might be authorized to make a compulsory examination of the papers of a corporation in the absence of a complaint of a specific violation of law, the Court pointed out that the statute itself limited investigations to the books of a corporation being "proceeded against" or "investigated." The Court suggested that the investigation was a scientific study of trade conditions and then proceeded (page 890):

> "Is there not a fair presumption that the investigation mentioned in the statute was one of another character than the one now being carried on, and that it was to be an inquiry into the way the particular corporation itself conducted its business, having as its substantial object the ascertainment of facts concerning that corporation, and as its ultimate end the possibility that in some way such corporate body might be required to mend its ways? If that be not the true construction of the act, and if it really means that, whenever the commission thinks best to make an inquiry into the way in which some great department of commerce is carried on, it may send its employees into the office of every private corporation which does an interstate business in that line, and empower them to go through the company's books, correspondence, and other papers, I am satisfied it goes beyond any power which Congress can confer, in this way, at least."

In the majority opinion of the Circuit Court of Appeals in the instant case the Court said:

> "Common justice would seem to demand that before the business methods pursued by a corporation or an individual should be investigated, the party should be apprised either by a formal charge or by notice of the extent of the purposed investigation, in order that a day in court may be accorded. This is essential to determine whether the Commission is acting within its jurisdiction and to meet the charges preferred."

In *Maynard Coal Company* v. *Federal Trade Commission*, 48 Wash. Law Rep., 278, in the Supreme Court of the District of Columbia, the opinion in which was adopted by that court in the instant case, Mr. Justice BAILEY cited with approval the opinion in the *Basic Products Company* case, *supra*.

Unless paragraphs (a) and (b) express a purpose as well as powers the purposes of the Act are clearly the enforcement of section 5 and of the Anti-Trust Laws. Under the third construction, if the Act is not to be construed differently from the Interstate Commerce Act, the investigations of the Commission would be limited to such as may be required to insure compliance with section 5 and the Anti-Trust Laws. The Interstate Commerce Commission has regulatory powers, vastly greater than the Commission possesses, over all railroads engaged in interstate commerce and would appear to require greater powers of investigation than the Commission, yet this Court has deemed it the purpose of Congress to limit its powers of investigation to its requirements, namely, to match its powers of regulation. It is hardly conceivable that with the earlier statute and its interpretation before it Congress would not have clearly made known its intent to give unlimited powers of investigation to a new Commission entrusted with strictly defined substantive powers, corrective rather than regulatory, over a very limited subject matter.

5. The Construction by the Commission Is Not Warranted by Departmental Interpretation.

In the Brief for Appellants reference is made to various reports published by the Commissioner of Corporations or by the Commission as evidencing the long continued construction of the Act and of the prior statute. It appears from the reports mentioned that they were based on information voluntarily furnished and that frequently information was refused.

It is argued on behalf of the Commission that Congress, fully aware of the construction given by the several Commissioners of Corporations to the Act creating the Bureau of Corporations, employed the same language as to investigations as was used in that Act adding to it the word "business" and that such action amounted practically to an express adoption by Congress of the construction previously given that Act by the Government. It appears however that the Committee which introduced the bill in the House of Representatives was not so certain as to the construction theretofore placed upon the sections of the Act creating the Bureau of Corporations which dealt with reports and investigations. That Committee in its report (Brief for Appellants, Appendix, paragraph 12) said:

> "There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them."

Furthermore that Committee explained in the next succeeding paragraph just what was intended to be covered by the annual reports:

> "13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the

country are provided for setting forth essential facts connected with the organization, stockholders, financial condition, and general business conduct of those concerns."

6. *Consequences of Such Construction.*

The consequences flowing from acceptance of the construction placed upon the paragraphs by the Commission are worthy of consideration in attempting to discover the purpose of Congress in enacting them. As to such consequences the language of the Court in the *Harriman* case is most apt (page 417):

> "Before taking up the words of the statute the enormous scope of the power asserted for the commission should be emphasized and dwelt upon. The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By Sec. 12 of the act of 1887, the commission has authority to require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.
>
> "How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass

> it by. Whether Congress itself has the unlimited power claimed by the commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

It is true that as above indicated the statute involved in the *Harriman* case specifically gave to the Interstate Commerce Commission power *to obtain information necessary to enable it to perform its duties* and *"carry out the objects"* for which the statute was enacted and *"for the purposes of this Act"* to require testimony and the production of papers. It is also true that the section of such statute there considered has since been amended to broaden the powers of the Interstate Commerce Commission in respect of information which it may secure. Nevertheless even in its present form that section authorizes investigations and the procuring of information only in respect of matters having some proper relation to the purpose of the Interstate Commerce Act and to the subjects over which the Interstate Commerce Commission has jurisdiction.*

*Interstate Commerce Act, section 12 (24 Stat. L. 383, as amended by 25 Stat. L. 858; 26 Stat. L. 743). "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information *necessary to enable the Commission to perform the duties and carry out the objects for which it was created;*" * * *

"And *for the purposes of this act* the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents *relating to any matter under investigation.*" * * *

"The testimony of any witness may be taken, at the instance of a party, *in any proceeding or investigation depending before the Commission*, by deposition, at any time after a cause or proceeding is at issue on petition and answer."

The consequences of accepting the construction placed upon the paragraphs by the Commission are indeed so enormous that they are suggested rather than indicated in the language above quoted from the *Harriman* case. The Commission claims the right to secure the information demanded in respect of prices, costs, production and capacity figures, orders, balance sheets, etc., on the alleged ground that such information has to do with commerce as defined in the Act. If it can be held that information of this character bears such relation to interstate commerce as to warrant Congress in requiring the production thereof, then clearly Congress can secure not only similar information but also different information of various kinds as to agriculture and all other industries. As we have pointed out above, the theory underlying this claim cannot be limited to information from corporations. The cost of production of steel by a corporation can have no greater relation to interstate commerce than the cost of production of grain by a farmer, and if the relation to such commerce is the basis for the procuring of information as to such costs such information would appear to be obtainable from individuals and corporations engaged in farming, stock or sheep-raising or any manufacturing or other industry the product of which is disposed of in part in interstate commerce. But, as this Court has pointed out in *Kidd* v. *Pearson*, 128 U. S., 1, at page 20:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce;

and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests — interests which in their nature are and must be, local in all the details of their successful management."

7. Our Construction Is Supported by the Other Sections.

In the Act, sections 9 and 10, the Commission is given powers regarding the compulsory examination of witnesses and the production of evidence at least as broad as those conferred upon the Interstate Commerce Commission. If paragraphs (a) and (b) are deemed to confer independent powers having no relation to the general purpose of the Act, it must follow that the securing of information is one of the purposes for which the powers under section 9 were granted and that the authority of the Commission flowing from section 9 in any investigation under those paragraphs would be as extended as that of the Interstate Commerce Commission, the vast scope of which authority was pointed out by the Court in the *Harriman* case. That is, if one of the purposes of the Act is to have undefined investigations made under paragraphs (a) and (b), the Commission in making any such investigation can exercise all the powers granted by section 9, including that of summoning witnesses from any place in the United States to any designated place of hearing and requiring the production of such documentary evidence as it desires at such designated place, and all the powers of the Federal Courts can be used to enforce such authority of the Commission. It is stating it mildly to say that if Congress intended to confer upon the Commission such extraordinary powers over any corporation which may sell beyond state boundaries and without any limitation as to the subject matter upon which such corporation may be investigated, Congress was stretching its own authority to the utmost and might reasonably be expected to have set forth in the Act some purpose necessitating that such powers be conferred upon an administrative body.

The requirements of section 10 are particularly illuminating as to the matters in respect of which Congress intended to grant jurisdiction to the Commission. As above pointed out, that section makes it a penal offense, punish-

able by fine of not less than $1,000 or more than $5,000 or by imprisonment for one year or by both, to neglect or refuse to answer any lawful inquiry or to produce documentary evidence in obedience to the subpoena or *lawful requirement of the Commission.* It also makes it a penal offense, punishable by like fine or by imprisonment for not more than three years or by both penalties, (a) to make any false entry or statement of fact in *any report required to be made under the Act* or *in any account, record or memoranda kept by any corporation* subject to the Act, or (b) to neglect or fail to make full, true and correct *entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation* or (c) to refuse to submit to the Commission or any of its authorized agents for the purpose of inspection and the taking of copies *any documentary evidence of such corporation.*

If the scope of the Act is not limited to the interstate business of corporations this means that any corporation engaged in interstate commerce must keep for the Commission accounts, records or memoranda of all facts and transactions appertaining to any of the business of such corporation, and, furthermore, that any documentary evidence in relation to any of such business must at any time be submitted to the Commission or to any agent thereof. Unless Congress has power to control, and the right to examine all the books, papers, accounts and documentary evidence of, any corporation engaged in business of any kind which in any degree engages in interstate commerce, such requirements obviously are in excess of the power of Congress.

In the case of *United States* v. *L. & N. R. R. Co.*, 236 U. S., 318, involving a similar provision in the Hepburn Act referring to the documentary evidence of common carriers which should be subject to inspection by the Interstate Commerce Commission, this Court held that the terms "accounts, records or memoranda" at least

excepted correspondence files. It is not necessary for us to contend, and we do not contend, as intimated in the Brief for Appellants (page 16), that the power to regulate commerce extends only to the instrumentalities of commerce, but this Court has sufficiently distinguished the Congressional authority under the Commerce Clause over instrumentalities of commerce from its authority over other corporations. It has indeed been intimated "that there can be nothing private or confidential in the activities and expenditures of a carrier engaged in Interstate Commerce." *Smith* v. *I. C. C.*, 245 U. S., 33, at page 43.

If, in the statute affecting carriers, as to whose activities there may be nothing private or confidential to be withheld from Congress, this Court was unwilling to interpret such a clause as applicable to all papers in possession of the carrier, surely in the Act a like provision must be interpreted as applying only to those papers which deal directly with and have some legitimate bearing upon the interstate commerce of an ordinary manufacturing or trading corporation. Therefore the penalties prescribed in section 10 for offenses in connection with the papers which under paragraphs (a) and (b) and the other provisions of the Act can be examined at any time by the Commission must be deemed to apply not to all papers of any corporation which engages to any extent in interstate commerce but only to such of its papers as pertain to that interstate commerce. The powers of investigation and inspection granted by those paragraphs and enforceable by the provisions of section 10 must have some immediate connection with the interstate dealings of such a corporation. Certainly the costs of production, amounts allowed for depreciation, discounts on obligations, the tonnage capacity of a mill and the other information called for by the Commission have no such direct relation to interstate commerce as will warrant the application of section 10 thereto.

8. Our Construction Is Supported by the History of the Interstate Commerce Commission.

The Courts in such cases as that of *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S., 194, have shown their desire not to limit the authority of the Interstate Commerce Commission or to question its exercise of discretion in investigations provided that the subjects of the investigation can be shown to have some material effect upon or relation to interstate commerce. The Courts have not, however, recognized in any case an unlimited power in the Interstate Commerce Commission to investigate any person or corporation upon any subject which such Commission might desire to investigate. The person or corporation being examined and the subject under investigation must in some manner be connected with the interstate commerce for the regulation of which that Commission was created. *So, in the present instance, the powers under paragraphs (a) and (b) must, if they are not to be treated as an unlawful grant of unlimited power, be construed as applying to corporations and subjects having some relation to that freedom of competition in interstate commerce for the safeguarding of which the Commission was established.*

This principle is exemplified in all the cases cited in the Brief for Appellants. The argument for the Commission is that the Constitution conferred all powers proper for the exercise of each power expressly granted and that among the powers so conferred is that of acquiring information. On this point the cases of *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447, and *Smith* v. *Interstate Commerce Commission*, *supra*, are cited and quoted from.

As pointed out in such Brief the Court in the *Brimson* case stated that the power granted to the Commission by Congress imposes upon anyone summoned the duty to appear and testify and produce the books, papers, etc.,

called for, *if relating to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate and if the witness is not excused on some personal ground from doing what the Commission requires at his hands.*

As quoted (page 26), the Court in the *Smith* case said:

> "The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that [*Harriman* case] * * *. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We can not assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling."

It will be observed that these cases deal with the power of the Interstate Commerce Commission over carriers. It is unnecessary to do more than mention the obvious distinctions between the power of Congress over carriers, which are instrumentalities of commerce, and over manufacturing corporations, which are engaged in commerce only to the extent that they buy or sell some of their materials or products in interstate commerce.

In the Brief for Appellants the case of *In re Chapman*, 166 U. S., 661, is referred to as sustaining an Act of Congress providing for the punishment of a person who should refuse to testify when summoned as a witness before either House of Congress or any Committee of either House. As stated in that Brief (page 27) "the court was of opinion that *where the subject matter was within the jurisdiction of the two Houses and the information demanded was pertinent to the subject* it was competent for Congress to demand it."

It is unnecessary to discuss the cases cited from the State courts since they deal with the power of state legisla-

tures, which power is not necessarily akin to that of Congress, derived solely from the Constitution.

The Brief for Appellants in following up this argument falls into a curious error in stating (page 31) that "it is not conceivable that the Court will now hold that, despite the duty of Congress primarily to make this determination [whether the subject under investigation relates to interstate commerce or whether such subject has any effect upon interstate commerce], it can not procure the information on which to base its conclusions unless it is voluntarily produced". It is unnecessary for this Court so to hold or to hold that persons required to produce information by Congress may in each instance come to the Courts for a determination as to whether the information is indispensable to the legislative power, as queried in that Brief. It is asked (page 32) "Must Congress constantly resort to the courts for a determination of what is or what is not necessary to the proper exercise of a power conferred upon Congress by the Constitution?" The question to be determined is whether the information sought by the Commission in this case has such a relation to interstate commerce and concerns a subject having such effect upon interstate commerce that it can properly be brought within the purview of Congressional action. Presumably the Court will not undertake to decide in advance on what subjects Congress can properly legislate. In seeking information prior to legislation Congress, however, is not exercising its legislative power but, as pointed out in the Brief for Appellants, is exercising an implied power which affects directly the individual from whom the information is sought. The right of Congress to exercise such power directly affecting the rights of a citizen is necessarily in each instance subject to examination by the courts at the instance of the citizen regardless of the character of the information desired. Notwithstanding the completeness of the legislative power of Congress there can be no question that when Congress undertakes to exercise a power

affecting an individual citizen that citizen may have his rights determined by the courts.

9. Our Construction Is Supported by the Decision in the Terminal Taxi-Cab Company Case.

The *Goodrich* case above referred to is hereinafter discussed more fully. A case more nearly in point in the present connection is that of *Terminal Taxi-Cab Company v. District of Columbia*, 241 U. S., 252, involving the power of the Public Utilities Commission of the District of Columbia, which Commission, established by Act of Congress, was given authority to require reports and information from any public service corporation in the District. A public utility was obliged to obey "all lawful orders" of such Commission. Congress being the one legislative authority in the District, its power in the matter was not based solely on the Commerce Clause as in the other cases discussed. The Taxi-Cab Company was engaged in three kinds of business:

> (1) Furnishing taxi-cab service, under contract with the railroad terminal authorities, for railway passengers using the terminal;
>
> (2) Furnishing taxi-cab service to guests of various hotels; and
>
> (3) Furnishing automobiles for use by individuals upon telephone calls to the central garage of the Taxi-Cab Company.

The Court held that as to the first two branches of its business the Taxi-Cab Company was a public utility and was required to furnish such information as the Utilities Commission might require in respect thereof. The third branch of the business, which produced about forty per cent. of the entire revenue of the Company, was held not to be business of a public character and as to such business the Court held that the Company need give no information to the Utilities Commission. In its decision the Court

emphasized the distinction between that case and the *Goodrich* case, pointing out that the interrelation existing as to the various enterprises of the Transit Companies in the *Goodrich* case was not present in the business of the Taxi-Cab Company. The Court said (page 256):

> "If we are right this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in *Int. Comm. Comm.* v. *Goodrich Transit Co.*, 224 U. S., 194, 211, * * *. Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility."

In the instant case Congress is not acting under its power over the District of Columbia or any other power but is limited to such authority as it derives from the Commerce Clause. In applying the Act to the appellees the Court must recognize that in this case there is no public service involved as in the *Taxi-Cab Company* case or in the *Goodrich* or *Harriman* cases. Notwithstanding the allegations of the Commission as to the public interest affecting the business of the appellees, Congress in the Act has not undertaken to impose upon corporations engaged in such business any of those obligations with which businesses affected with a public interest usually are charged and certainly Congress has in no legislation given to the Commission authority in its discretion to impose such obligations upon any corporation.

10. The Construction by the Commission Calls for Unprecedented and Unauthorized Power.

Such a power over corporations as the Commission claims has never yet been exercised by Congress and the Courts have uniformly refrained from recognizing the existence of any such power in Congress. The Commis-

sion, however, does not rest solely upon the existence of any general visitorial power in Congress but bases its claim upon the contention that, inasmuch as Congress has complete power to regulate interstate commerce, it can, in its unrestrained discretion, require any person or corporation desiring to enter into interstate commerce to comply with any conditions which it may desire to impose. (Record, pages 82, 83.)

This contention would appear to be sufficiently answered by the *Child Labor* cases (259 U. S., 20, and 247 U. S., 251) and the *First Employers' Liability* cases (207 U. S., 463). The former cases presented clearly the question of the extent of the power of Congress over corporations engaged in manufacturing products which are sold in interstate commerce, and the determination of the Court was, as in innumerable earlier cases, that until the products are shipped in interstate commerce Congress has no power over such products and that prior thereto it has none over the conduct of the corporations which send such products into interstate commerce. The *Employers' Liability* cases established that Congress cannot enact legislation not relating to interstate commerce but applicable to carriers merely because they are engaged in interstate commerce. The Court also definitely held in that case that Congress has no power to prohibit any person or corporation from engaging in interstate commerce except upon compliance with such terms and conditions as Congress may see fit to impose (page 502):

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. *It assumes that because one engages in interstate commerce he thereby*

> *endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern.* It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." (Italics ours.)

The law on this point appears to be that every citizen must be left free to enter into any business, whether requiring that to some extent he engage in interstate commerce or not, subject it may be only to the power of Congress completely to forbid such business in objectionable commodities, such as lottery tickets, liquor or prize fight films, and to the absolute right of Congress to establish such regulations as it may deem proper affecting the interstate part of such business, provided that the regulations so established shall apply only to interstate commerce or to such intrastate matters as may also require regulation by Congress to avoid restraint upon or discrimination against interstate commerce. In the latter situation it may well be that the power of Congress is still more limited and that it may apply only to instrumentalities of interstate commerce like the railroads or to the intrastate affairs of a business in so far as used as a cloak against the effect of regulation by Congress of the interstate part of the business. However this may be, corporations as such are not as to all their affairs

subject to investigation by Congress and they are not otherwise brought within the jurisdiction of Congress merely through carrying on some of their business in interstate commerce and, therefore, paragraphs (a) and (b) must be interpreted as at least limited to authorizing the Commission to make investigations and require reports concerning the interstate business of corporations and such relations and practices of corporations engaged in interstate commerce as may affect interstate commerce. Such an interpretation is consistent, and it is obvious that it is the interpretation most consistent, with the spirit of all the other sections of the Act, all of which deal, as has been pointed out, with interstate commerce and particularly with violations of the Anti-Trust Laws, which laws apply and *can apply* only to interstate commerce.

Conclusion.

Paragraphs (a) and (b) must be interpreted in connection with the other provisions of section 6 and of the Act. As we have seen when so interpreted the power conferred thereby is a reasonable power and is subject to reasonable limitations. If the third interpretation be the correct one the power is limited to alleged or reasonably suspected violations of the laws over compliance with which the Commission has supervision.

It is apparent that, if the paragraphs are taken as conferring power in utter independence of the remainder of the statute, there are no limitations upon the power and no expressed purpose for such power, notwithstanding the fact that Congress has no general visitorial power over corporations whether engaged in interstate commerce or not. The Commission suggests that, inasmuch as under paragraph (f) of the section it is authorized to publish such of the information obtained as it shall deem expedient, it was therefore the intent in paragraphs (a) and (b) to procure information for the

purpose of publication. How strained such a construction is a casual reading of the three paragraphs discloses. There is absolutely no connection between (a) and (b) and (f), except in the discretionary power granted under (f) to make certain uses of information obtained under (a) and (b). The conclusion from such argument would be that Congress, deeming it possibly desirable that information be published, conferred upon the Commission absolute power to determine whether or not such publication was desirable and as a corollary gave it power to obtain all possible information from which it could pick and choose what to publish. Not only may this be an unlawful delegation of legislative power but aside from that the construction is so unreasonable as hardly to merit consideration.

THEREFORE THE CONCLUSION IS THAT THE ACT DOES NOT PURPORT TO, AND DOES NOT, GIVE THE COMMISSION POWER TO INVESTIGATE ALL THE BUSINESS OF ANY CORPORATION MERELY BECAUSE SOME OF ITS BUSINESS IS IN INTERSTATE COMMERCE.

C. The orders of the Commission to the appellees exceed the power granted to the Commission.

If the only grant of investigatory authority to the Commission is that contained in the Act and if the extent of the grant is measured by the purpose of the Act as a whole, then it is apparent that the Commission in the orders which the Commission has issued and the questions which it has propounded to the appellees has exceeded the powers contained in such grant. The Act as a whole unquestionably relates to interstate commerce and just as clearly to the prevention of violations of statutory enactments concerning conduct in interstate commerce embodied in section 5 and in the Anti-Trust Laws. In its answer the Commission clearly recognizes that the business of the appellees in production is not interstate commerce, although in the answer it is averred that the intrastate activities and the interstate business of the appellees cannot be separated, and it is also averred that if they were separated the information as to interstate business only would not be of use to the Commission, but no facts are alleged to support such conclusion. (Record, page 86.)

1. The Act Applies Only to the Interstate Commerce of Corporations.

In view of the fact that the Commission in its allegations recognizes the division of the businesses into (1) production or purchase of raw materials, (2) manufacture of finished products and (3) sale thereof, and considering also that the answer was specific as to the percentage (65% or more) of the total business done by each appellee in interstate commerce, the conclusion mentioned at the close of the last preceding paragraph is disproved by the allegations. The meaning must be that from the point of view of the Commission, considering the purpose for which it desires the information, the facts as to the intrastate features of the business, particularly as to the production of coal or steel products, are essential to the Commission. From

this it follows that the Commission requires information with some design having reference to profits and the relation between costs and selling prices, for only as to such matters would segregation be difficult. It may be granted that the selling prices of those products which are sold in interstate commerce are inevitably dependent upon factors involving to a degree the selling prices of those which are sold in the States where produced and that the cost of production of one part cannot accurately be determined separately from that of the other.

That the purpose of the Commission involves prices and profits is admitted in its answer. The Commission stresses the importance of the price of coal and steel upon the prices of food and other products and openly admits that the information is desired for the purpose of publication of facts for the use of the public and the other producers, of whom it is stated a large number had entered the two industries since 1917. (Record, page 88.) It appears, therefore, that the Commission has two things in mind, one having to do with industry and commerce as a whole and the other dealing with the particular industries involved, and in each case with particular interest in prices and profits.

As to the first point it is obvious that the desire of the Commission for complete information can not be satisfied by the appellees and other corporations engaged in the coal and steel business furnishing all the information which the Commission may ask for. The Commission still would have only incomplete information because it would have no facts regarding the retail trade in these or any other industries, regarding agriculture and other industries involving the production of other raw materials or regarding the innumerable branches of business involved in the exchange of goods between the producer of raw material and the ultimate consumer of finished products. All of this information should be obtained if the Commis-

sion is to have complete information, and publicity thereof, covering the entire commercial life of the country.

In the *Baltimore Grain Company* case, *supra,* as we pointed out above the Court for this reason questioned the power of the Commission to compel the production of evidence in such an investigation.

2. *The Commission Can Not Regulate Prices.*

As to the second point the Commission must show that it has received from Congress some power over prices of goods produced by *the two industries* involved before it can require, *in the absence of complaint involving prices,* information as to the elements upon which such prices are based. In the *Wolff Packing Company* case involving the Kansas Court of Industrial Relations, 262 U. S., 522; 67 L. Ed., 756, Mr. Chief Justice TAFT has distinguished three classes of so-called public businesses and has pointed out that the regulatory power of the legislature over such businesses differs in respect of the several classes. The regulation which was attempted in the business there involved was a regulation as to wages, which unquestionably would have effect upon prices. The Court held that, although the particular industry was that of meat packing and thus of the utmost importance to the State, the business was not affected with sufficient public interest to warrant the particular kind of regulation there attempted, the argument of the Court being that regulation of prices or the costs on which prices must be based is within the jurisdiction of the legislature only as to those businesses which in an exceptionally high degree are affected with a public interest. The business of manufacturing or of selling coal or steel products has never been declared by Congress to be affected with a public interest in any degree.

The following language used by the Court in that case is peculiarly appropriate in this connection (page 760, L. Ed.):

> "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn* v. *Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.
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> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.
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> "An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (*United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 540; *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252, 256, 60 L. ed. 984, 987, P. U. R. 1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765); and while this feature does not necessarily exclude businesses from

the class clothed with a public interest (*German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915C, 1100, 34 Sup. Ct. Rep. 612), it usually distinguishes private from quasi public occupations.

* * *

"To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

"If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorized full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Brandeis when characterizing a similarly extreme contention. Civil Rights Cases, 109 U. S. 3, 24, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 14th Amendment."

Granting that the Commission has authority to make investigations to some extent into the business of corporations engaged in interstate commerce, it does not follow that the Commission has authority to investigate even such business in respect of matters over which the Commission has no power. There is no warrant in the Act or in any other legislation of Congress for the assumption of jurisdiction by the Commission in respect of prices charged by the appellees for their products and those on

to no question that the Commission has no control or authority in any respect over the prices of commodities whether sold in interstate commerce or not. The prices of goods sold in interstate commerce are in and of themselves no more the concern of the Commission than the age or family relationship of the individuals who make the sales or purchases of such products. As Circuit Judge Jackson, subsequently a Justice of the Supreme Court, said in *In re Rose et al.*, 32 Fed., at page 112, a case involving an indictment under the Sherman Law:

> "But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owners, or anyone, whether corporations or individuals." (Italics ours.)

This was quoted with approval by Mr. Chief Justice White in the dissenting opinion in which three other Justices concurred in the *Northern Securities* case, 193 U. S., 197, at page 364.

Under the principle enunciated in the *Harriman* case the Commission is limited in its investigations to corporations over which it has some jurisdiction and to the affairs of such corporations to the extent that the Commission has jurisdiction thereof. If it were alleged that the appellees were selling their products in interstate commerce at prices discriminating between different purchasers with the effect of substantially lessening competition or tending to create a monopoly in violation of section 2 of the Clayton Act or if the prices of goods sold by the appellees in interstate commerce were otherwise a proper subject of investigation by the Commission, it may be that the Commission could require information as to such prices

and, possibly, as to the prices of like goods sold by the appellees in the States where produced. In the absence of a complaint as to a violation of law in respect of prices or in respect of which prices are material, the Commission can not be entitled to information except as to interstate prices.

The cost of producing such goods, however, can have nothing to do with the discriminations in price against which section 2 of the Clayton Act is aimed. It is significant that in that very section it is provided that nothing therein contained shall prevent discrimination in price on account of differences "in the cost of selling or transportation or * * * prevent persons (defined in the Act to include corporations) * * * from selecting their own customers in bona fide transactions." *Nothing is said about costs of production*, which of course have no relation to unlawful discrimination or monopoly.

The Commission having no jurisdiction over the profits or prices of the appellees, even as to the prices of their products sold in interstate commerce, in the absence of any complaint or even of any allegation that the elements of such prices are in some manner involved in a violation of the laws regulating interstate commerce the Commission has no right to information as to the elements of cost entering into such prices, which elements relate to manufacture, and to commerce.

3. *The Investigations Authorized Must Relate to the Purposes of the Act.*

As to corporations engaged in interstate commerce the paragraphs give to the Commission power to examine into and require reports as to their organization, business, conduct, practices, management and relation to other corporations or individuals. Under section 5 it has authority to institute proceedings to prevent the use of unfair prac-

tices. Under paragraphs (d) and (e) of section 6 it has authority to investigate, when directed by the President or either House of Congress or requested by the Attorney General, alleged violations of the Anti-Trust Laws. It has power to enforce section 5 but not the Anti-Trust Laws. The reasonable interpretation of paragraphs (a) and (b), therefore, is that the power granted was in connection with the purpose of section 5, to be used when complaint was deemed unnecessary, and supplemental to the power under paragraphs (d) and (e). *Organization, management* and *conduct of business*, are the subjects of paragraph (c) and apply to violations of Anti-Trust Laws. *Practices* is the key word of section 5. *Relation to other corporations or individuals* might refer to the Clayton Act, the Sherman Act or to section 5. All the subjects of investigation are matters which may have to do with interstate commerce or violations of section 5 or of the Anti-Trust Laws. Neither under any of such subjects nor in relation to interstate commerce or the Anti-Trust Laws will information as to the capital structure, depreciation account, plant capacity, unfilled orders, costs of production or selling prices of any corporation have any pertinence.

4. *The Act Does Not Authorize Investigations of Economic Conditions.*

Except for the economic argument concerning supply and demand in the Brief for Appellants, the only justification which the Commission has offered for requiring reports as to the costs and other phases of the production of the appellees or of their wholly intrastate business or corporate affairs is that stated in the answer (Record, page 87) *that the purpose of the Act was to procure the recognized benefits of regulation through publicity of all facts as to entire trades and to submit to Congress recommendations for legislation.* In the lower Courts it was

argued that publicity of true facts would be valuable to those in the trade in that they could determine what products were profitable and whether there was overproduction or need for further production; that the figures produced could be used in settling wage controversies; that facts would be useful to capital seeking investment in that investors would know whether the field was inviting and needed capital or not and to the public in that it as well as the producers and sellers would know whether prices were reasonable or not and whether added legislation should be recommended. The Commission has not been established to supervise or regulate or assist investors in business subject wholly to State control such as the mining of coal and the manufacture of coke or steel nor has it been given any authority in respect of the relations between the appellees and their employees.

In the Brief for Appellants an effort is made to show that the information called for by the Commission is necessary to ascertain whether the normal relation of supply to demand in interstate commerce is being disturbed. An effort is also made to show the relation to interstate commerce of the different classes of information called for by the forms for reports submitted to the appellees. The discussion deals rather with economic and accounting problems than with law. The law of supply and demand is not based upon the Constitution and has not been established by any act of Congress. The Commission has no jurisdiction over it or any power to enforce it. Congress has legislated as to certain conditions which were deemed likely to interfere with the free play of competitive forces and no question is made by the appellees as to the right of the Commission to investigate any violation of such legislation which may be reported to it or which it may reasonably believe to exist. The Commission has not been constituted to maintain in operation any or all economic laws. As President Wilson in his

message to Congress of January 20, 1914, in response to which the Act was passed, said of the Commission which he proposed : The opinion of the country "would not wish to see it empowered to make terms with monopoly or in any way *to assume control of business, as if the Government made itself responsible.*" The Committee in reporting the bill to the House said "The Commission has in no sense been empowered to make terms with monopoly or in any way to assume control of business. * * * There has been no attempt to deal with the question of maintenance of fixed prices. The Commission has been given no power to pass orders in any way regulating production." (Brief for Appellants, Appendix, paragraph 33.)

In the Brief referred to the purpose of the Commission is frankly admitted to be the making of an economic survey of business conditions, particularly as to prices in respect of what it calls necessities. That prices of commodities had enormously increased should be sufficient proof that the law of supply and demand or one or more other so-called economic laws were operative rather than any unlawful conduct in the steel or coal industry. If not, the fact that prices in general had enormously increased throughout the world should obviate any attempt at last to indict a whole people or any industry. If such conditions and the possible power of Congress to enact some legislation which in some manner might react on prices will warrant the prying into private affairs of manufacturing corporations here attempted, Congress must have power to compel the filing of reports by all citizens as to the amount of gold, silver, Federal Reserve Notes or other moneys possessed by them, since it can legislate concerning money. Congress has never attempted to exercise any such power of investigation and has not delegated such power to the Commission.

The entire argument of the Brief for Appellants on this point is to the effect that from the information demanded certain conclusions can be reached by economic reasoning as to the profitableness of the steel industry and that the Commission might conclude to make more specific inquiry into the circumstances of artificial market control if it should deem such control indicated. If such an investigation does not show that the Commission has assumed or intends to assume control of business it is that kind of a "fishing expedition" which this Court condemned in the case of *Ellis* v. *Interstate Commerce Commission*, 237 U. S., 434, 445. The Act clearly did not intend to authorize such control or any such expedition.

THUS, THE COMMISSION, NOT HAVING RECEIVED ANY POWER EXCEPT UNDER THE ACT AND BY THE ACT NOT HAVING RECEIVED ANY AUTHORITY TO MAKE SUCH AN INVESTIGATION AS IT HAS UNDERTAKEN TO MAKE, ITS ACTION IS IN EXCESS OF ITS AUTHORITY. IT CANNOT INVESTIGATE MANUFACTURE OR MINING.

II.

Congress could not grant to the Commission power to investigate the manufacturing activities of corporations which sell their output in interstate commerce.

In enacting the Act Congress was acting only under its power under the Commerce Clause of the Constitution. The Supreme Court has repeatedly declared that the powers of Congress and of the other departments of the Federal Government are enumerated powers and that no Federal authority has any power except such as is enumerated in the Constitution or must necessarily be implied as granted for the enforcement of some enumerated power. The Federal powers are thus different from those of any other sovereign state and are different also from those of the States of the Union, to which, or to the people, were reserved by the Constitution all powers except those specifically enumerated in the Constitution or so impliedly granted.

There is no specification of any such visitorial power over corporations as is sought to be exercised in this instance by the Commission and it therefore contended in the answer (Record, page 82) that the power of Congress to grant such authority is included in the general welfare provisions of the Constitution or in one or more enumerated powers. The phrase "General Welfare" occurs twice in the Constitution. It occurs first in the preamble but it is universally recognized that no grant of authority to Congress or to any other Federal body is contained in the preamble. *Jacobson* v. *Massachusetts*, 197 U. S., 11, 22. The phrase also occurs in the clause granting the taxing power but as there used it is not a grant of power but a limita-

tion upon the power granted, expressing merely one of the purposes for which Congress has authority to levy taxes. This was pointed out in *U. S.* v. *Boyer*, 85 Fed., 425, 431, where the Court quoted the opinion of Mr. Justice STORY, *Constitution*, Secs. 907, 908.

The Commission also claimed that the authority here sought to be exercised was granted under the power of Congress to take a census, to levy taxes or under its war powers. The Act does not, however, mention the census, taxes or war and it was adopted at a time when this country was at peace. There is nowhere in the Act any suggestion or indication of any kind that Congress was exercising any of such powers. It is not to be assumed that Congress enacts legislation merely in lusty exuberance of power and yet on the contention of the Commission Congress must have granted the authority claimed by the Commission for no particular purpose and with no design other than that of exercising its power to enact such legislation. The point hardly deserves argument since the mere reading of the Act shows a specific and proper design in keeping with the dignity of Congress so that it is entirely unnecessary to make any forced or unwarranted assumptions as to any fantastic purpose or lack of purpose on the part of Congress. The Act was adopted with a view to the regulation of interstate commerce and in the exercise of an unquestioned power to legislate upon interstate commerce. There is no doubt that under the Commerce Clause Congress has been given full and complete authority over the regulation of interstate commerce and, as the Act was enacted indisputably in the exercise of such authority, the question is, therefore, has Congress exceeded such authority.

A. The power of Congress over interstate commerce does not extend to manufacturing or mining.

1. The States Have Power to Regulate Manufacturing and Mining.

The power of the several States to regulate manufacturing and mining industries has been repeatedly declared by the courts to be supreme. In the case of *Kidd* v. *Pearson, supra,* a statute forbidding the manufacture of liquor within a State for other than certain specified purposes was sustained as not in conflict with the power of Congress to regulate interstate commerce, notwithstanding the fact that as interpreted and enforced by the State the manufacure within the State of liquor to be sold in interstate commerce was thereby prevented. In the case of *Heisler* v. *Thomas Colliery Co.*, 260 U. S., 245; 67 L. Ed., 119, the power of the State of Pennsylvania to levy a tax upon anthracite coal based upon its value when prepared for shipment was sustained over the objection of numerous other States which showed that over eighty per cent. of the coal was shipped in interstate commerce. In the case of *Oliver Iron Mining Co.* v. *Lord,* 262 U. S., 172; 67 L. Ed., 573, the Court sustained the power of the State of Minnesota to levy upon ore producers an occupation tax based upon the amount of iron ore produced, notwithstanding the admission that over ninety-nine per cent. of the ore so produced was shipped in interstate commerce for use in other States and that as a rule the mining of the ore consisted in dumping the ore by steam shovels or other means from open mines directly into railroad cars which when loaded were at once forwarded in interstate commerce.

Regarding the contention that because eighty per cent. of the coal was shipped to other States the tax interfered with interstate commerce, in the *Heisler* case the Court said (page 122, L. Ed.,):

> "The result would be curious. It would nationalize all industries; it would nationalize and with-

> draw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to States other than those of their production."

In the *Oliver Mining Company* case, the Court said (page 576, L. Ed.):

> "Mining is not interstate commerce, but like manufacturing is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * * The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved."

The converse of this is illustrated by the case of *Pennsylvania* v. *West Virginia*, 262 U. S., 553, 623; 67 L. Ed., 762, soon to be re-argued. In that case the Court held unconstitutional, because of its interference with the jurisdiction of Congress over interstate commerce, a statute of West Virginia which would require the withdrawal from interstate commerce for domestic use of natural gas which had entered the stream of such commerce.

The case of *Crescent Oil Company* v. *Mississippi*, 257 U. S., 129, presented the question whether a State can forbid a corporation engaged in manufacturing cotton

seed oil to operate any cotton gin in such State. The plaintiff was a corporation of Tennessee which in violation of the statute operated a cotton seed mill in that State and two cotton gins in Mississippi. The Court held that the manufacture of cotton seed oil and the ginning of cotton were not commerce and that an article in process of manufacture although intended for export to another State was not an article of interstate commerce and that, therefore, the State had power to legislate on the subject regardless of the interstate commerce power of Congress. The Court said (page 136):

> "When the ginning is completed the operator of the gin is free to purchase the seed or not, and, if it is purchased to store it in Mississippi, indefinitely, or to sell or use it in that State, or to ship it out of the State for use in another, and, under the cases cited, it is only in this last case and after the seed has been committed to a carrier for interstate transport that it passes from the regulatory power of the State into interstate commerce and under the national power."

2. *Congress Can Not Regulate Manufacturing or Mining.*

The foregoing cases recognize that power over manufacturing and mining resides in the States. On the other hand power which Congress has sought to exercise under the Commerce Clause has been held to have been improperly exercised when the subject was manufacturing or mining. In the case of *United States* v. *E. C. Knight Company*, 156 U. S., 1, the Government endeavored to apply the Sherman Law to the purchase of stock in manufacturing companies. The Court said (page 11):

> "It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within

the limits of its dominion' is a power originally and always belonging to the States, not surrendered by them to the general Government nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general Government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

The Court, therefore, held that the transaction was not within the statute and was not subject to any power which Congress could exercise.

It is argued in the Brief for Appellants that the power of Congress to regulate interstate commerce extends to all matters which may burden or restrain such commerce even though not actually a part thereof and attention is called to the decrees of this Court in dissolving combinations of manufacturing companies in the *Standard Oil Company, American Tobacco Company, International Harvester Company* and *Reading Company* cases. In each of these cases the Court found, in substance, that manufacturing companies had, through various methods,

formed combinations with the purpose and effect of restraining interstate commerce in their products, thus differing from the *Knight* case, *supra*, as made out by the Government. It would, of course, have been useless in any of these cases to decree that the combination might retain the unified control of production which had been unlawfully acquired and to decree merely that separate selling organizations should be re-established. We have no doubt that if the purpose of the combination in any of those cases had been to effect a monopoly the defendants would have welcomed a decree permitting them to retain control of production.

The effect of such control upon interstate commerce in the sale of the output would, of course, be immediate and direct and therefore such improperly acquired control was clearly within the jurisdiction of Congress and the only feasible method by which the courts could re-establish competitive conditions was to require that the influences so affecting interstate commerce should be separated. This, however, was not, and was not intended by the courts to be, a recognition of any power in Congress to regulate production or corporations engaged in production. The right which the courts were enforcing was the right to regulate interstate commerce and any artificial condition hindering or interfering with the freedom of such commerce. The situation obviously is entirely different from that of twenty-two independent corporations against which there is no suggestion of collusion or combination and which are actively engaged in competition in the sale of their products. The fact that the rise and fall in prices charged by one or more of such competitors may have some effect upon the quantities sold by them in interstate commerce is obviously not such an effect as brings the manufacturing of such product within the jurisdiction of Congress, otherwise Congress must have power over the production, transportation and sale of every commodity sold in this country, since every sale must have some influence on the national market for commodities.

3. *Congress Has Power to Control Obstructions to the Freedom of Commerce.*

This Court made clear the proper distinction in *United Mine Workers v. Coronado Coal Co.*, 259 U. S., at page 410:

> "The difference between the *Patten* case and that of *Ware & Leland v. Mobile County*, 209 U. S. 405, illustrates a distinction to be drawn in cases which do not involve interstate commerce intrinsically but which may or may not be regarded as affecting interstate commerce so directly as to be within the federal regulatory power. In the *Ware & Leland* case, the question was whether a State could tax the business of a broker dealing in contracts for the future delivery of cotton where there was no obligation to ship from one State to another. The tax was sustained and dealing in cotton futures was held not to be interstate commerce, and yet thereafter such dealings in cotton futures as were alleged in the *Patten* case where they were part of a conspiracy to bring the entire cotton trade within its influence, were held to be in restraint of interstate commerce. And so in the case at bar, coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred."

In the first *Employers' Liability* cases, supra, the Court held unconstitutional a statute passed by Congress regulating the liability of employers who as common carriers were engaged in interstate commerce upon the ground that the statute applied to all common carriers engaged in interstate commerce and attempted to regulate their

relations with their employees whether or not employed in interstate commerce. After the decision of these cases Congress enacted a new statute which was sustained by the Court, the objection to the former statute having been eliminated by making the regulation applicable to common carriers only to the extent that they were engaged in interstate commerce.

Congress in the *First Child Labor* case, *supra*, endeavored, through the use of its power to regulate interstate commerce, to forbid the shipment in interstate commerce of the products of child labor in manufacture. That law having been declared unconstitutional, Congress endeavored, in reliance upon its power to levy taxes, to achieve the same result, that is, to prevent the sales of products of child labor in manufacture. In each instance the Court held the statute to be unconstitutional because it involved a regulation of manufacture, over which Congress had no jurisdiction.

In the case of *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S., 211, the Government had secured an injunction under the Sherman Act to restrain manufacturers of iron pipe from acting under agreements in restraint of trade and commerce. Although the Court sustained the decree, as unquestionably warranted by the evidence of agreements to restrain interstate commerce, it ordered the decree modified so that it should not apply to such agreements in so far as they related to commerce wholly within a State.

If, therefore, as necessarily follows from these cases, the power of Congress over interstate commerce does not apply to the appellees since they are engaged in the mining of coal or ore and the manufacture of coke, iron and steel, Congress could not give to the Commission any power over these corporations since, of course, its subordinate authority can have no greater power than Congress itself has.

4. *The Decision in the Stockyards Case Was Based Upon Such Power.*

The Commission lays great stress upon the decision of the Supreme Court in the case of *Stafford* v. *Wallace*, 258 U. S., 495. In that case the Court was considering a statute providing for the supervision by Federal authority of the business of commission men and live-stock dealers in the great stockyards of the country. The Court sustained the act as a valid exercise of power under the Commerce Clause because of the direct effect of the transactions of the commission men and the live-stock dealers upon interstate commerce in live-stock and because the relations existing, or which Congress reasonably could have deemed to exist, between the commission men and live-stock dealers and the packers who purchased the greater part of the live-stock sold by the commission men enabled, or were reasonably deemed likely to enable, the packers unreasonably to restrain the freedom of interstate commerce in live-stock.

The Court emphasized the fact that the stockyards are not places of final rest for the commerce in question. This of itself is a sufficient basis for distinguishing that case from the present case. The mining appellees are engaged in interstate commerce only to the extent that their products when mined and the coke when manufactured therefrom are shipped in interstate commerce. The steel manufacturing appellees are engaged in interstate commerce to the extent that their raw materials come to them in varying measure through the channels of interstate commerce and to the extent that some of their finished products are sold and shipped therein. The mine is the place of origin of the ore and coal entering interstate commerce and is, of course, not an intermediate place of transitory stoppage. The coke or steel manufacturing plant is unquestionably the terminus of the interstate commerce in the raw materials used by it and the place

of origin of the products which it ships in interstate commerce, which are entirely different from the raw materials and represent a complete mutation of character. The separation between manufacture and sale is admitted in the Brief for Appellants (page 63): "The commodity may be made long in advance of an order, it may be (as is especially true for pig iron and semi-finished steel) indeterminate with respect to what final sales product it will be converted into." In so far as the appellees are engaged in interstate commerce, they are so engaged in two entirely separate transactions and it cannot be said that a steady stream of interstate commerce is passing through their plants as in the case of the stockyards.

The cases are further distinguished by the absence of any suggestion of direct effect, lawful or unlawful, upon interstate commerce or of any burden imposed thereon by the appellees as in the *Stafford* case.

Commerce in live-stock as at present conducted has this distinguishing characteristic which the Court clearly had in mind: cattle are grown in and shipped from many States by vast numbers of individuals who have on the whole a comparatively limited market and cattle ultimately reach the consumer in the form of meat products, which have been prepared by a comparatively small number of packers. Thus, on the one hand are great numbers of producers and on the other the entire community as consumers with the traffic to a large extent flowing through a comparatively small number of packers. Thus control over the commerce is or may be centralized in a few hands. Moreover, the facilities for handling the cattle are stockyards in a very few of the larger cities of the country. Upon these stockyards presses constantly a mass of cattle which must immediately be disposed of and got out of the stockyards, and the packers themselves who receive the larger part of this mass must, notwithstanding modern storage facilities and methods of treat-

ing meat products, rapidly dispose of this mass of cattle. There is thus from the necessity of the case this possibility of centralized control over the commerce and, on the other hand, the urgency of the flow from the point of view of the producer, the stockyards, the packer and the consumer. Any interference in the stockyards with the flow of this stream in the opinion of the Court would directly burden the commerce in live-stock and meat products.

In the case of coal there are vast numbers of producers but an individual producer can control his production to a far greater extent than can a grower of live-stock. The market for coal is world-wide and the producer is not required, as is the cattle grower, to ship to a limited number of markets. In the case of the appellees their coal production does not even reach the market since each producer produces only for his own use in manufacture. The same situation applies in respect of ore. A mine owner can permit his ore to lie in the ground from one year to another and is not under the necessity of disposing of his ore at particular periods as is the cattle grower when his cattle reach a certain age. There is no point in the passage of coal or ore from the producer to the consumer of the ultimate steel product at which the streams of raw materials congest as in the case of the stockyards.

In the case of *Board of Trade* v. *Olsen*, 262 U. S., 1; 67 L. Ed., 519, which involved the constitutionality of a statute for the regulation of transactions on grain futures exchanges, the Court sustained the power of Congress to regulate such transactions because they were deemed to be incidental to, and to have the possibility of unduly burdening, the constant stream of interstate commerce in the grain dealt in on such exchanges.

Not only, therefore, do these two cases not furnish any support to the contention that Congress by the Act properly gave to the Commission jurisdiction over the appel-

lees not limited to their interstate commerce, but on the principles on which those cases were decided, it must be clear that Congress has no jurisdiction over the general business of the appellees and therefore did not and could not give any such authority to the Commission. In each instance the business the regulation of which was authorized by Congress was a business which in and of itself had previously been held by the Court not to be interstate commerce. Owing to the peculiar circumstances affecting each business, Congress then declared that as conducted those businesses were directly burdening interstate commerce and were so intimately related with the commerce in grain that the businesses should be regulated like public utilities. The Court, although it has frequently stated the law to be that the legislative authority cannot by fiat make over a purely private business into one affected with a public interest and therefore subject to regulation, held that in these cases the circumstances were such as to warrant Congress in treating the businesses as affecting the public interest and hence subject to regulation, which regulation was held to be properly that of Congress owing to the direct relation between the business and interstate commerce.

The Act does not apply specifically to mining or to the manufacture of coke or iron or steel and Congress in this or any other statute has not endeavored to declare that such businesses are public utilities. Hence the basis of the authority of Congress to regulate which was found in the *Board of Trade* and *Stafford* cases does not exist in the present case and any regulation as to these businesses cannot be deemed a precedent warranting the exercise of such regulatory power over the appellees.

THE COMMISSION, THEREFORE, HAS NO POWER TO REQUIRE INFORMATION AS TO MANUFACTURING OR MINING.

B. Although the Commission may have investigatory power over such business of the appellees as is interstate commerce this does not give it such power over their other business.

It is contended that inasmuch as the statute clearly confers upon the Commission certain regulatory power over corporations engaged in interstate commerce at least as to such commerce, as regards unfair methods of competition for instance, and in connection therewith investigatory powers, then the Commission must have authority to investigate all the business of such corporations, particularly in cases where, as is alleged to be the situation in this case, the businesses are inextricably intermingled. In the answer it is urged that the power of Congress over interstate commerce is complete and that, therefore, it can exact any desired terms from any corporation engaging in such commerce and that this was indisputably true where the two phases of the business of a corporation are so closely related that Congress cannot effectively regulate the interstate business without regulating the intrastate business. Great reliance as to this contention was placed upon the case of *Interstate Commerce Commission* v. *Goodrich Transit Company, supra.*

In that case the Interstate Commerce Commission was endeavoring to procure from the Transit Companies information in many respects like that required in this case by the Federal Trade Commission. The Transit Companies operated a line of vessels on the Great Lakes which transported passengers and freight from port to port within single States and from a port in one State to a port in another State and a substantial part of its business consisted of such freight transportation on through shipments received from or delivered to railroads under joint through rate arrangements and through ticket passenger traffic. One of the Transit Companies also owned

and operated several amusement parks. The Transit Companies contended that although Congress might have endowed the Commission with authority to procure information as to the traffic under joint arrangements with the railroads it had not given and could not give the Commission any authority to require information as to any other business of the Companies.

The Court answered this contention by pointing out that the Companies were unquestionably within the class of companies to which the Act applied and that there could be no doubt that the Commission had authority to require information as to the interstate business of companies in that class. The Court also held that inasmuch as the Commission had such authority, *although it had no regulatory authority over the other business of the companies*, it could in the circumstances require such information thereon as was necessary to prevent the use of such other business and the accounts thereof in concealing practices and information concerning the interstate business which the Commission did have power to regulate. What the Commission was interested in particularly was the matter of rates and clearly when the same facilities of a company are used in transporting interstate traffic as in transporting that which does not cross any State lines the Commission cannot determine the reasonableness of any rate in interstate commerce unless it does have full information as to the entire business of such company, and for this purpose it was held to have authority to require accounts to be kept in a specified manner and regular reports to be made covering all the business of the Transit Companies.

It is clear from this very case that the Court was not extending the power of the Commission over business not within the jurisdiction of Congress under the Constitution. It was not authorizing an inquiry into intrastate business merely because conducted by a corporation en-

gaged in commerce. The Court was of opinion that the business of the Transit Companies was such that, the Companies being under the jurisdiction of the Commission as to certain matters and particularly as to their rates and charges, the Commission was entitled to full knowledge as to their entire business affecting such matters, because that was necessary to prevent that part of the business which in and of itself was outside the jurisdiction of the Commission from being used to conceal unjust discriminations and violations of rate regulations in that part of the business which in respect of such matters was within the jurisdiction of the Commission. As above pointed out the Court in the *Terminal Taxi-Cab Company* case, *supra,* indicated the necessary relationship between the various businesses of the Transit Companies which required the investigation authorized in the *Goodrich* case and in the absence of such relationship reached a different result in the *Taxi-Cab Company* case.

It will be observed that the Court in the *Goodrich* case took judicial notice of the character of the several kinds of business of the Transit Companies and that it considered that such character would not permit the businesses to be segregated and that information as to a part of the business could not be complete as to such part without information as to the remainder. Such clearly is not the case in the cause at bar. As we have shown above, the interstate commerce of the appellees is limited to the purchase and shipment of some raw materials and the sale and shipment of some finished products in interstate commerce. Not only is it so clear as to require no argument that the manufacturing of coke or iron or steel or the mining of coal or ore is not inseparably connected with the purchase and shipment of ore and coal or the sale and shipment of coke or iron or steel products, but there is the further distinction that there is no relationship of rates or prices in this

case as in that. The selling price of coal or ore or steel products within a State does not have any relation to the price thereof when sold for shipment out of a State and the Commission admits that the commerce in steel disregards State lines. (Brief for Appellants, page 61.) This, of course, does not mean that in case of any alleged violation of section 5 or of any of the Anti-Trust Laws the Commission cannot, if price be involved, inquire into and require information as to the prices of such commodities in intrastate commerce if they are affected by or if they affect interstate commerce and prices in interstate commerce. In this case, however, which involves no complaint on any score against any of the appellees, this question does not arise and the Commission cannot, therefore, rest its case in any degree upon the *Goodrich* case.

We have already shown that Congress has no authority to establish any arbitrary conditions as a prerequisite to the entry of any corporation into interstate commerce. This being true, it may be admitted that the power of Congress over interstate commerce is as full and complete as the Commission contends if by this is meant that in the exercise of its lawful authority over interstate commerce the power of Congress is subject to no limitation other than the limitations prescribed by the Constitution and that no State or other authority can interfere with or infringe upon the prerogatives of Congress in respect of such commerce.

In this connection it should be observed that, as appears from the bill of complaint, one appellee produces pig iron and sells fifty per cent. of its total production in the State of Pennsylvania, where its plants are located; that another appellee produces pig iron in the State of Pennsylvania and sells about eighty per cent. of its output in that State; that a third appellee mines coal and manufactures it into coke and sells its entire product in the State of

production. As to these appellees the Commission averred on information and belief that the greater part in both quantity and value of purchases and sales made by each is in interstate or foreign commerce. These appellees are excepted from the allegation in the answer, on information and belief, that the appellees make sixty-five per cent. or more of their sales in interstate or foreign commerce. There is no indication anywhere in the amended answer or in any of the briefs filed on behalf of the Commission that the Commission will not require, or that it has any doubt as to its right to require, the desired information from these three appellees although their allegations as to the sale of their products in the State of production were true.

Indeed from the arguments in the answer it is apparent that the demand of the Commission for the required information is based not upon the fact that the output of any appellee enters interstate commerce but upon the theory that Congress has unquestionable authority to legislate concerning, and to acquire any desired information in respect of, any industry the products of which have a national market. In the Brief for Appellants this argument is not so openly pressed but the theory of the Brief is essentially the same, that Congress can authorize the Commission to gather information if Congress *can* use such information in any legislation (pages 21 and 44) and because some sales are made in interstate commerce all sales and factors entering into prices can be investigated (page 61). It will be recognized that the argument that the Act need not be based on the power of Congress over interstate commerce but is within the tax, tariff, census or some other power of Congress carries the implication that Congress could empower the Commission to require information from any individual or corporation although the grant as limited is to be exercised only in respect of corporations in interstate commerce.

The Supreme Court has said in as recent a case as the *Wolff Packing Company* case, *supra*, which was decided in June of the present year (at page 759, L. Ed.,) that an ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes. In that case the Court was dealing not with the power of Congress over interstate commerce but with the power of a State over a business which admittedly was in the power of the State to regulate although not subject to the kind of regulation which the statute endeavored to impose. The case thus rests upon the principle that regardless of the completeness of the power of regulation, whether in Congress as to interstate commerce or in the States as to intrastate commerce, there are limits beyond which regulation can go only upon certain conditions and in certain cases.

Moreover as the Court has pointed out in the *Gasoline Pump* cases, 261 U. S., 463; 67 L. Ed., 483, involving complaints brought by the Commission against various oil corporations in respect of leases of gasoline pumps to retail gasoline dealers (page 488, L. Ed.,):

> "The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called 'competition.' The great purpose of both statutes (the Clayton Act and the Federal Trade Commission Act) was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

When this statement is considered in connection with the statement of the Court in the case of *United States* v. *Colgate & Co.*, 250 U. S., 300, at page 307, that

> "In the absence of any purpose to create or maintain a monopoly the (Sherman) Act does not restrict the long recognized right of trader or manufacturer

> engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.",

it is apparent that the Supreme Court has not yet recognized any authority in the Commission to regulate business, even in interstate commerce, except in respect of securing obedience to the laws heretofore enacted by Congress to secure freedom of interstate commerce and as above pointed out there is no legislation by Congress on the statute books establishing or regulating the prices at which the appellees or other ordinary merchants or manufacturers shall sell their wares. Having no regulatory authority as to prices the Commission, in the absence of a complaint involving prices, has therefore no power to require information concerning the costs upon which such prices may be based.

That the Commission has absolutely no authority over prices, even of goods sold in interstate commerce, has been expressly held by the Circuit Court of Appeals for the Second Circuit in a case in which certiorari was refused by the Supreme Court, *The Mennen Company* v. *Federal Trade Commission*, 288 Fed., 774. In its decision in that case wherein it reversed a "cease and desist" order of the Commission the Circuit Court said (page 781):

> "* * * We have no doubt that the Mennen Company had the right to refuse to sell to retailers at all, and if it chose to sell to them that it had the right to fix the price at which it would sell to them, and that it was under no obligation to sell to them at the same price it sold to wholesalers."

In the case of *United States* v. *Freight Association*, 166 U. S., 290, the Supreme Court used the following language (page 320):

> "The trader or manufacturer * * * carries on an entirely private business, and can sell to whom

> he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

Except in so far as the law has been changed by section 2 of the Clayton Act and by section 5 of the Trade Commission Act that statement expresses the law as it is today and neither of those sections makes any change as to price or confers any jurisdiction upon the Commission as to price except in respect of discriminations which may tend to interfere with the freedom of interstate commerce.

As was again recognized in the *Wolff Packing Company* case, *supra*, businesses of the character of those conducted by the appellees are entirely private businesses. They are, therefore, not subject to any jurisdiction of the Commission in respect of prices, not only because Congress has given no such jurisdiction to the Commission but also because Congress had no power to give any such jurisdiction to the Commission. Hence prices can be investigated only as facts bearing upon some phase of interstate commerce. In this case interrogatories deal with intrastate, manufacturing, facts bearing upon prices.

THE COMMISSION COULD NOT BE GRANTED POWER TO INVESTIGATE THE INTRASTATE BUSINESS OF THE APPELLEES.

C. Neither Congress nor the Commission has any power to require information on any matter over which it has no regulatory power.

The Constitution of the United States recognizes what is one of the fundamental principles of the common law.

that the papers and the personal effects of the citizen should be secure from official intrusion except under proper legal authority. Hence, it is a generally recognized principle that no governmental authority has power to investigate the private affairs of citizens except in respect of some matter over which such authority has jurisdiction. The rights of a corporation in this respect differ from but are governed by the same principles as those of an individual. The State which has created a corporation is commonly said to have a general power of visitation over such corporation because the corporation exists by the favor of the State and the State has the right and power to ascertain how its creature is exercising the privileges granted to it by the State.

The Federal authority over corporations created under Congressional sanction is probably the same as that of a State over corporations organized under its laws. The courts have gone no further, however, in respect of Congressional power over State corporations than to recognize a power in Congress as complete as that in the States in respect of inquiries as to obedience to those Federal laws to which a corporation may be subject. It cannot reasonably be assumed that Congress delegated the right to procure any desired information from corporations as a substantive purpose and power. The provisions of the Act concerning investigations and procuring of information must be construed in connection with the purposes of the Act for the achievement of which the information is to be acquired. Consequently, the information which can properly be acquired must have to do with the purposes of the Act and bear some relation either to regulation of interstate commerce or to some violation of the laws for the enforcement of which the Commission was established. The contention of the Commission that the procuring of information is not regulation is rather ingenuous in view of the insistence by the Commission upon the effectiveness of

regulation by publicity and upon its right to acquire information for the purpose of publication.

Stress is laid by the Commission upon the statement of the Court in the *Goodrich* case, *supra*, that the requiring of information concerning a business is not a regulation of that business. What the Court was considering in that case was the contention of the companies that the Interstate Commerce Commission had no power to regulate that part of the business of the companies which was not interstate commerce and the statement of the Court meant that, granted that the Commission had no authority to regulate such business, *per se*, it could in the circumstances of that case require information as to such businesses because such requirement would not be a regulation but would produce information affecting that which could be regulated. The Court did not hold that the Commission had authority to require information from the Company as to matters in respect of which the Commission had no power to deal. In fact the principle on which the case was decided is a recognition that the right to require information must be coupled with the right to take action in respect of the information procured, that is, that the information as to the amusement parks owned by the Transit Companies was properly required because the Commission could have taken action in respect of the amusement parks and the financial arrangements of the Transit Companies therewith if such arrangements were used by the Transit Companies to cover any violation of the laws which the Commission was authorized to enforce in respect of the interstate commerce of the Companies.

In the *Harriman* case, *supra*, the Court refused to recognize any power in the Commission, in an investigation which admittedly the Commission was empowered to conduct, to require information from a witness as to matters not involved in any subject over which the Commission had jurisdiction.

In the case of *Hale* v. *Henkel,* 201 U. S., 43, the Court quoted (page 72) the following language, with no evidence of disagreement, from the *Brimson* case, *supra*:

> "It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents *relating to any matter legally committed to that body for investigation.*"

As the Court said in the case of *Ellis* v. *Interstate Commerce Commission, supra,* where the Court was considering the right of the Interstate Commerce Commission to investigate the affairs of a corporation not a common carrier (page 445):

> "The Armour Car Lines not being subject to regulation by the Commission its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice."

In that case the Court refused to require a corporation to answer questions on matters relating to that corporation as to which the Commission had no jurisdiction although it did permit inquiry as to certain matters over which the Commission did have jurisdiction.

In the case of *Terminal Taxi-Cab Co.* v. *District of Columbia, supra,* the same principle was applied.

As above pointed out, in every case in the lower courts where the Commission has endeavored to require a corporation to divulge information regarding its intrastate business it has been held that the Commission had no such authority.

All these cases illustrate the principle that the investigatory power can be used only in relation to a subject of possible regulation. As we have shown the subject mat-

ter of the inquiry is not subject to regulation by the Commission or Congress.

HENCE NEITHER THE COMMISSION NOR CONGRESS HAS ANY POWER TO INQUIRE INTO THE AFFAIRS OF THE APPELLEES NOT DIRECTLY RELATED TO SOME PHASE OF INTERSTATE COMMERCE OVER WHICH THE COMMISSION OR CONGRESS HAS REGULATORY POWER.

D. The inquiry of the Commission does not relate to interstate commerce.

In the Brief for Appellants (page 80) it is admitted that the inquiry of the Commission constitutes an investigation rather than the requirement of reports. The Commission realizes the difficulty of bringing its action within the language of the Act since what it required was not an annual or a special report but regular monthly reports although in the Brief it is naively suggested that as a matter of law the order to furnish monthly reports was merely a notice that a report at the end of each month would later be called for.

The kind of report which Congress authorized the Commission to require is indicated in the report of the House Committee (Brief for Appellants, Appendix, paragraph 16), which speaks of compulsory publicity of an abstract of the annual and special report of each corporation which, in the bill as introduced, was required to be included in the annual reports which the Commission was to publish. Although the Act does not contain the provision of the bill that abstracts of such reports from each corporation should be included in the annual report of the Commission, it does authorize the Commission to require an annual report from every corporation engaged in commerce and special reports,

presumably supplemental thereto, if such should be deemed necessary. Such reports are to be annual or special reports "or answers in writing to specific questions" in reference "to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals * * *". There is no indication in the Act or in the bill as introduced that Congress had any intention of authorizing the Commission to require current reports of all the business operations of all the corporations in a particular industry. Inasmuch as the Commission tacitly admits this and treats its demands for reports as an investigation, it follows that paragraph (a) is involved in this cause rather than paragraph (b).

The Commission also seems to realize, however, that its power to investigate must be exercised in respect of subjects over which it has some authority or in respect of which Congress can legislate and, since the Commission recognizes that it has no authority over the business of the appellees which is not interstate commerce and that Congress cannot legislate in respect of such business, it suggests that of necessity it has authority to procure such information in order that Congress may be advised whether proposed legislation will affect interstate or intrastate commerce of the appellees. Such a contention, it is apparent, argues the Commission out of court because, as it admits that its investigatory authority is limited to that field over which Congress can legislate, it must admit that it has no power to require information concerning other subjects as to which it does not know whether or not Congress can legislate. The power of Congress over the subject matter must first be established before the investigatory power of the Commission can function. This clearly must be so, for there is no limit to the investigatory authority of the Commission if it can require the production of any information which it demands in order that, having acquired such information, it can then determine whether or not

such information is of the character which it has authority to acquire and in respect of which Congress can act.

The dilemma in which the Commission finds itself compels it to base its claims on an argument in economics rather than in law, and as above pointed out Congress has no authority to maintain any economic law, its province being, in respect of interstate commerce, to enact such legislation as it may deem proper to govern the conduct of those who are subject to the play of economic forces. It is not contended, of course, that Congress has exhausted its power of legislation or that, if the economic views of Congress shall change, it cannot enact legislation affecting interstate commerce in order to limit the free operation of economic forces, contrary to the design of the existing legislation. What we contend is that the power of the Commission must be sought in the Act rather than in the economic views of Congress or the Commission and that any proceeding by the Commission must find its warrant in some Act of Congress and not in any economic law.

The information demanded by the Commission, as is clear from the argument under Point IV of the Brief for Appellants, concerns the economic conditions under which the entire steel industry, and in fact all industries, were operating in the year 1920, rather than any transaction or series of transactions in interstate commerce by any of the appellees, or the effect of any such transaction in respect of any legislation of Congress. The theory on which the argument is based seems to be that the legislation of Congress as to interstate commerce may change as economic conditions change, and that therefore the Commission is authorized to acquire any desired information regarding economic conditions. It is true that Congress must legislate in the light of economic conditions existing or expected, but it is also true that the legislation which Congress can enact will deal not with such conditions but with the conduct of businessmen as affected thereby.

The investigation concerns prices. It is admitted that the Commission has no jurisdiction over prices since it offers the omission from the Act of any provision therefor as an argument for the validity of the Act. (Brief for Appellants, page 70.) *This very admission, however, is embodied in an argument that it can influence prices by publicity.* No one can complain if in some manner through publicity prices are reduced by some competitors. That would be the result of the operation of economic forces. What is complained of, and properly so, is the examination, without legal warrant, into private affairs and publication of the results, the consequences of which can not be foreseen.

The Sherman Law is not, as argued in the Brief for Appellants, concerned with prices but with agreements or conspiracies which may result in fixing or enhancing prices. The offense condemned in *American Column & Lumber Co.* v. *United States*, 257 U. S., 377, was the action *in concert* of lumber manufacturers to affect interstate commerce and restrict competition therein. The Court applied the law to manufacturers because of the purpose to restrict competition, not because of the curtailment of production or because the law applied to production. That case is hardly an authority in support of the desire of the Commission for publicity as to facts and figures on production.

The argument for requiring balance sheets and income statements is, like that as to information on intrastate business, reducible to absurdity: the Commission is entitled to them because unless it has them it cannot determine whether they contain information to which it is entitled.

THE COMMISSION, THEREFORE, HAS NO AUTHORITY TO REQUIRE THE INFORMATION DEMANDED.

E. Enforcement of the demands of the Commission would violate rights secured to the appellees by the Fourth Amendment to the Constitution.

The enforcement of the orders of the Commission amount to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution. The Commission is asking for information on matters of interest solely to the appellees and involving facts as to their individual businesses which not only are of no concern to the Commission and not within its jurisdiction but which each appellee considers trade secrets.

It is true that the Commission has obtained no search warrant and has not physically invaded the premises of the appellees or examined their books. Its demands have, however, been reinforced by pointed references to the penalties impending if the appellees shall refuse compliance with those demands. Physical entry upon the premises and manual seizure of person or property are not requisite to a violation of the Fourth Amendment. In *Boyd* v. *U. S.*, 116 U. S., 616, the Court had to consider the validity of a statute of Congress which provided that in certain cases upon motion of counsel for the Government a court could order the production of documents and upon non-compliance therewith the allegations in the motion should be taken as true. The subject matter of the case was clearly within the jurisdiction of Congress since it involved frauds on the customs yet the Court held that the Government could not by such a statute achieve the same results as by a search and seizure when a search and seizure could not lawfully be had.

In the present case the Commission by the infliction or at least the threatened imposition of penalties endeavors to compel the production of evidence on matters which do not concern the Commission. If Congress violates the

Fourth Amendment by statutory enactment having the effect of compelling the production of evidence in a suit properly brought to punish an alleged offense against the customs laws of the nation, unquestionably a body subordinate to and deriving its limited authority solely from Congress cannot compel the disclosure of facts on subjects over which such body has no jurisdiction and in respect of which no action, criminal or civil, is being prosecuted. It is not doubted that Congress had power to confer, and did confer, upon the Commission some authority to make investigations and in connection therewith to compel the production of evidence. We are not here concerned primarily with what regulatory power the Commission may have, but solely with the right of the appellees to be protected in the privacy of such of their affairs as are not within the jurisdiction of Congress. The position of the appellees on this point is that the Fourth Amendment guarantees to them the right of privacy as against Congress or any creature of Congress except in so far as that right must be subject to the superior right of the Government to secure information as to matters within the purview of Congressional power.

If by the Constitution Congress had been given unlimited power over corporations or over business in general, it may be that a corporation could not interpose the Fourth Amendment in any investigation which Congress might authorize into corporations or general business. The instrument of which the Fourth Amendment is a part is the only source of Congressional authority and from that source flows no general authority over corporations and a power over business only in so far as it can be brought within the definition of commerce among the States or with foreign nations, hence the Fourth Amendment is a safeguard against any indiscriminate invasion under pre-

tense of Congressional authority of the rights of privacy of corporations as well as of individuals. The Commission justifies this investigation on the theory that Congress gave to it the power, bounded only by the discretion of the Commission, to examine the affairs of any corporation which may in any degree engage in interstate commerce. The appellees reply that if such power was intended to be given the Fourth Amendment renders the grant thereof unconstitutional.

That Congress itself is under restraints in the direct investigation of matters on which it desires information was settled by the case of Kilbourn v. Thompson, 103 U. S., 168. That case was an action for false imprisonment brought against the Speaker, other Representatives and the Sergeant-at-Arms of the House by a witness who for refusal to testify before a Committee of the House had been adjudged in contempt and placed under arrest. The Members of Congress were held to be protected by their constitutional privilege but the Sergeant-at-Arms was held liable. The Court avoided deciding the question actually at issue, whether Congress had general power to adjudge any one in contempt, by deciding that since the Committee was investigating a matter upon which Congress, regardless of the outcome of the investigation, could not enact legislation it had no power to compel the giving of testimony in such matter. The matter being investigated was a settlement reached by the Trustee in bankruptcy of the firm of Jay Cooke & Co., of which the Government was a creditor, with a so-called "real estate pool" in which, it would appear, some members of the firm were interested. As the matter was in the courts, the courts and not Congress had jurisdiction and if the courts could afford no remedy Congress could and by any proper legislation change the situation.

We have shown above that the Act did not give to the Commission or purport to give to it the power which the

Commission claims. Our contention here is two-fold: The Act must if possible be given a construction which will not render it unconstitutional and hence, as any other construction would bring it into conflict with the Fourth Amendment, the construction which we have indicated is thus shown to be correct; if our construction is not warranted by the statute as it stands, then Congress has enacted a statute in excess of its authority and the Act is void because conflicting with that Amendment. Leaving aside all questions as to crimination of corporations, the relevance or materiality of questions as a matter of evidence or the rights of witnesses in proceedings to which they are not parties, which usually are involved in cases where this Amendment is in question, the sole question here raised is whether Congress can authorize any body to ask any questions and compel the production of any information which that body may deem it advantageous to Congress or to the public to have answered or produced. The *Kilbourn* case definitely answers the question. Congress can require or authorize to be required only such information as concerns a subject matter of which Congress has jurisdiction. It begs the question to say, as the Commission says, that Congress must have full information to enable it properly to legislate on any matter. Any tariff, census, tax, commerce or war legislation of Congress can be scientifically sound and based on *full* information only if Congress has been endowed with omniscience or aided by a commission with authority to gather information in encyclopaedic detail. If such justification authorizes the requirement that all desired information be produced then there is nothing in the Fourth Amendment.

The Commission, however, says that this Amendment does not apply to corporations or limit the power of Congress. That it protects individuals only in criminal actions. But the clauses of the Constitution granting powers to

Congress must be construed in the light of the other clauses and the Amendments affecting the rights of citizens. Otherwise the Amendment must be construed as if it read in effect that all persons shall be protected against unlawful searches and seizures and no person shall be required to give any testimony which may tend to criminate him except that Congress may require the production of any testimony which it or anybody to which it shall delegate authority may desire.

As this Court said in *Counselman v. Hitchcock*, 142 U. S., 547, at page 585: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

In the case of *Hale v. Henkel, supra*, Justice HARLAN, who with Chief Justice FULLER dissented from the opinion of the majority, used the following language (page 80):

> "Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the amendments. The corporation of which the petitioner was an officer was chartered by a State and over it the general Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either amendment."

An officer of a corporation has been adjudged in contempt and has been committed for refusal to testify as to the business of the corporation or to produce all the papers demanded by a Federal grand jury which was investigating any an alleged combination of railroad companies in violation of the Sherman Law. The case came before the Supreme Court on the appeal of the witness from an order

of the Circuit Court which dismissed a writ of habeas corpus. Although the Court sustained the order as to the dismissal of the writ, it held that the *subpoena duces tecum* was so sweeping in its terms as to amount to an unreasonable search and seizure and as the Court pointed out it would be difficult if not impossible for the corporation to conduct its business if all the material called for by the subpoena were delivered to the Court. The majority of the Court was of the opinion that the subpoena could be modified and that such modification would not affect the duty of the officer of the corporation to testify and would not give him any right to plead on behalf of his corporation the Fourth and Fifth Amendments. The dissent of the Justices above mentioned was based upon their view that, admitting the defect in the subpoena, the order adjudging the witness in contempt should have been nullified. It would seem that the power to enforce laws on the statute books is at least of equal dignity with that of enacting new legislation and if the Government in the prosecution of any criminal case is limited by the prohibitions of the Fourth and Fifth Amendments it clearly is limited at least to the same extent by those Amendments in any investigation which may be undertaken preparatory to legislation.

The courts have indeed taken that view of the problem. In the *Harriman* case above cited, although the Court was not called upon to decide whether the investigatory power of Congress is unlimited, it did call attention to the statement in the case of *Interstate Commerce Commission v. Brimson*, *supra*, that such power as Congress has is not unlimited and the whole spirit of the opinion, from which the Justices who gave a dissenting opinion did not dissent, is that the power to any Commission created by Congress to require testimony is limited, "as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where

the investigations concern a specific breach of the law." It will be noted that in the *Harriman* case exactly the same contention was made by the Interstate Commerce Commission as in this case, namely, that it was authorized to procure any information which it deemed necessary for the performance of its duty to recommend additional legislation to Congress.

In the *Ellis* case, *supra*, which involved the same Commission, the objection of the witness to answering the questions propounded to him was based not upon the likelihood of incrimination by his answers but upon the fact that the inquiry was into affairs which were of no concern to that Commission. The Court expressly held that that Commission had no power to fish for information from strangers to the matters subject to regulation by it. In that case the Justice who dissented from the opinion agreed with the principle that the only power conferred upon the Interstate Commerce Commission was to make investigation into the affairs of outsiders only in so far as those affairs directly affected the subjects over which that Commission had some power.

The *Goodrich* case, on which the Commission places excessive reliance, is not in the slightest degree out of harmony with these decisions. That case is indeed a recognition of the principle followed in those opinions. Recognizing the supremacy of the Federal power over interstate commerce, the Court refused to limit the Interstate Commerce Commission to requiring information applicable strictly to interstate commerce when the matters concerning which inquiry was made involved intrastate affairs in such manner that the intrastate could not be separated from the interstate and could be used as a means of concealing information as to the interstate affairs.

That the protection of the Fourth Amendment does apply to corporations is clear from the case of *Hale* v. *Henkel*, *supra*. The language of Justice BREWER, con-

curred in by Chief Justice FULLER, in his dissenting opinion in that case is illuminating as to the supervisory power of Congress over corporations (page 87):

> "The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States."

The Supreme Court has recently followed the principle which in the case of *Hale* v. *Henkel* was applied by the majority and asserted in the minority opinion of Justice BREWER, namely, that a corporation is protected by the Fourth Amendment. In the case of *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S., 385, which was a criminal suit for violation of a Federal statute, the Government attempted to introduce evidence which had been procured from the files of the corporation in an unlawful manner. The Supreme Court held that such evidence was not admissible stating "The rights of a corporation against unlawful search and seizure are to be protected, even if the same result might have been achieved in a lawful way."

The case of *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, is in accord with the foregoing. The Interstate Commerce Commission in that case was making an investigation upon a complaint filed by a citizen against the anthracite coal railroads during the course of which the Circuit Court for the Southern District of New York issued an order requiring the testimony of officials of the roads and the production of certain books of the corporations, particularly contracts between corporations controlled by the railroad corporations for the purchase of coal from the operators of the coal mines at a fixed percentage of the prices at tide water. The order of the Court was appealed from on the ground that the papers and questions related to matters which that Commission had no right to investigate, being private affairs of persons not parties to the proceedings.

The Court held, on the same principle which it followed in the *Goodrich* case, that the questions should be answered and the papers produced because the contracts the production of which was required and concerning which the questions were propounded were made by agencies of the railroad corporations being investigated and referred to traffic which made up a large percentage of the business of such railroad corporations and that examination thereof was important to that Commission in order that it might determine whether the contracts were used as a cloak for rebates from the railroads or excessive rates.

How far the courts will go in maintaining those rights which are protected by the Amendment is evidenced in the recent cases of *Amos* v. *United States* and *Gouled* v. *United States*, both reported in 255 U. S. In the *Amos* case a defendant was on trial on an indictment charging the removal of whiskey on which the Federal revenue tax had not been paid to a place other than a Government warehouse and of having concealed such whiskey. The evidence introduced by the Government included certain

whiskey found in the home of the defendant and taken therefrom by revenue agents who called at his home in his absence and were admitted to the premises, apparently without any protest, by the defendant's wife. The agents had no warrant for arrest or for search.

In the *Gouled* case the defendant had been indicted for conspiracy to defraud the Government in connection with Army contracts. A friend of the defendant who was a private in the Intelligence Department of the Army secured access to the papers of the defendant and abstracted certain of them bearing upon the alleged fraud. When these papers were offered in evidence the defendant objected on the ground that admission of such evidence would violate the Fourth Amendment. The Supreme Court was unanimously of the opinion that the lower court erred in not striking out the evidence. This Court said (page 303):

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S., 616, in *Weeks* v. *United States*, 232 U. S., 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S., 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depre-

> ciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

The importance of the right of privacy as to papers was declared by Lord CAMDEN in the case of *Entick* v. *Carrington*, 19 Howell's State Trials, 1029, as quoted by Mr. Justice BRADLEY in the case of *Boyd* v. *U. S.*, *supra* (page 627):

> "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

In *ex parte Jackson*, 96 U. S., 727, violation of a statute against mailing any papers dealing with lotteries was involved. The Court had no evidence before it as to how the particular package was mailed and therefore had to pass merely upon the constitutional power of Congress to forbid the use of the mails for such purpose. In the course of the opinion, which was delivered by Mr. Justice FIELD, this Court said (page 733):

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the things to be

> seized, as is required when papers are subjected to search in one's own household."

It is thus clear from the *Silverthorne* and *Hale* cases as well as from the *Ellis* case that the Fourth and Fifth Amendments protect a corporation as well as an individual. It is also clear from the *Ellis* and *Harriman* cases that the right of privacy is to be protected in all cases where threatened and not merely in criminal actions. Therefore the principles followed by the Court in the *Harriman* and *Ellis* cases, and in the *Kilbourn* case particularly, must apply to the present cause and it must be held that Congress does not have the power to authorize any Commission to require the production of any evidence which such Commission may desire except in conformity with the rights of citizens, including corporations, under the Fourth and Fifth Amendments and that any unlimited grant of power to require testimony would clearly be in derogation of these rights and thus unconstitutional. The construction placed upon the Act by the Commission thus renders it unconstitutional because not within the power of Congress under the Commerce Clause and also because it constitutes an unwarrantable invasion of the privacy of the appellees violative of the Fourth Amendment.

THE APPELLEES THEREFORE SUBMIT THAT CONGRESS DID NOT INTEND TO GIVE TO THE COMMISSION ANY AUTHORITY TO INVESTIGATE THE AFFAIRS OF A CORPORATION ENGAGED IN INTERSTATE COMMERCE EXCEPT IN RESPECT OF ITS INTERSTATE AFFAIRS; THAT CONGRESS COULD NOT GIVE TO THE COMMISSION ANY POWER TO INVESTIGATE THE AFFAIRS OF A CORPORATION ENGAGED IN INTERSTATE COMMERCE EXCEPT AS TO SUCH INTERSTATE AF-

FAIRS BECAUSE CONGRESS ITSELF HAS NO JURISDICTION OVER THE OTHER AFFAIRS OF SUCH A CORPORATION; AND FINALLY IF CONGRESS DID INTEND TO GRANT POWER TO THE COMMISSION TO INVESTIGATE ALL THE AFFAIRS OF ANY CORPORATION ENGAGED IN INTERSTATE COMMERCE SUCH ENACTMENT IS NULL AND VOID AS IN EXCESS OF THE CONSTITUTIONAL POWER OF CONGRESS AND BECAUSE IT IS IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION SINCE SUCH AN ENACTMENT WOULD AMOUNT TO AN UNREASONABLE SEARCH AND SEIZURE.

III.

The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the appellants from the files should be affirmed.

Respectfully submitted,

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